No. 87-5096-CFX
Status: GRANTED

Title: Quincy West, Petitioner
v.
Samuel Atkins

Docketed:
July 8, 1987

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Giroux,Richard E., Stein,Adam

Counsel for respondent: Safron,Jacob L.

Entry	Date	Note	Proceedings and Orders
1	Jul 8 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Aug 13 1987		DISTRIBUTED. September 28, 1987
4	Aug 31 1987	F	Response requested -- JPS, WJB.
5	Sep 26 1987		Brief of respondent Samuel Atkins in opposition filed.
6	Sep 30 1987		REDISTRIBUTED. October 16, 1987
8	Oct 19 1987		Petition GRANTED.
			**********
10	Nov 16 1987		Order extending time to file brief of petitioner on the merits until December 10, 1987.
11	Nov 18 1987		Joint appendix filed.
12	Dec 10 1987		Brief amici curiae of ACLU Foundation, et al. filed.
13	Dec 10 1987	G	Motion of American Public Health Association for leave to file a brief as amicus curiae filed.
15	Dec 10 1987		Brief of petitioner Quincy West filed.
14	Dec 14 1987		Lodging received.
16	Jan 11 1988		Motion of American Public Health Association for leave to file a brief as amicus curiae GRANTED.
17	Jan 12 1988		Brief of respondent Samuel Atkins filed.
19	Feb 5 1988		SET FOR ARGUMENT, Monday, March 28, 1988. (3rd case).
18	Feb 8 1988		CIRCULATED.
20	Mar 28 1988		ARGUED.

87-5096

No. _____

IN THE SUPHEME COURT OF THE UNITED STATES
October Term, 1987

QUINCY WEST,
Petitioner,

v.

SAMUEL ATKINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Counsel of Record

July 8, 1987

QUESTIONS PRESENTED

1. Did a physician who was under contract to provide orthopedic services to inmates at a state prison hospital act under color of state law for purposes of §1983 in his treatment of a North Carolina state prison inmate?

2. Do prison physicians - whether permanent members of a state prison medical staff, or under contract with the state prison system - act under color of state law for purposes of §1983 liability in their treatment of state prison inmates?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Quincy West, and defendants Samuel Atkins, Rae McNamara, and James B. Hunt. Samuel Atkins was a physician acting under contract to the North Carolina Department of Correction, Rae McNamara was the former head of the North Carolina Division of Prisons, and James B. Hunt was the former governor of North Carolina.

The district court dismissed the claims against defendants McNamara and Hunt and the court of appeals dismissed plaintiff's interlocutory appeal of that order on April 23, 1985. On September 3, 1986, a panel of the Fourth Circuit affirmed the dismissal of defendant Hunt, but vacated the dismissal of defendant McNamara.

In its en banc decision, the Fourth Circuit reaffirmed the district court's dismissals of defendants McNamara and Hunt. Petitioner does not challenge these dismissals and thus defendant Atkins is the only respondent in this petition for certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

QUINCY WEST,
Petitioner,

v.

SAMUEL ATKINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner Quincy West respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on April 9, 1987.

OPINIONS BELOW

The April 9, 1987 en banc opinion of the Court of Appeals for the Fourth Circuit is reported at 815 F.2d 993, and is reprinted in the appendix hereto, p. A1-A19, infra (hereafter "App.").

The September 3, 1986 panel opinion of the Court of Appeals is reported at 799 F.2d 923. App. C1-C5. On November 12, 1986, the Court of Appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. App. B1.

The June 7, 1985 order of the United States District Court for the Eastern District of North Carolina (Boyle, Terrence W.) has not been reported. App. D1-D2.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were issued on April 9, 1987. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> > (3) To redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> >
> > (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

On November 29, 1984, petitioner Quincy West a state prison inmate, filed a pro se complaint under 42 U.S.C. §1983. He claimed deliberate indifference with respect to treatment for a torn achilles tendon, which he injured while playing basketball at Odom Prison in Jackson, North Carolina, on July 30, 1983. In his Complaint, petitioner alleged that Dr. Samuel Atkins refused to perform surgery to repair the torn achilles tendon, electing instead to employ a cast to see if the torn tendon would grow

back together on its own. Petitioner also alleged that between August, 1983 and November, 1984, Dr. Atkins maintained a hostile attitude toward him, refused several times to prescribe pain medication, and continued to refuse to perform corrective surgery after months of failure of his injury to heal.

Dr. Samuel Atkins provided orthopedic services to inmates at Central Prison Hospital in Raleigh, North Carolina. He was employed pursuant to the terms of a "Contract for Professional Services," under which he was paid nearly $1,000 per week for conducting two clinics per week at Central Prison Hospital, with additional amounts up to $30,000 per year for surgery.

On June 7, 1985, the district court allowed defendant Atkins' motion for summary judgment (App. D1-D2), holding that Atkins was not acting under color of state law for purposes of §1983, in reliance on Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert denied 471 U.S. 1132 (1985). Calvert v. Sharp held that a doctor who provided medical services to prisoners did not act under color of state law where he had no supervisory responsibilities, was actually employed by a professional association which contracted with the state for his services, had a substantial practice excluding his prison work, derived a large share of his income from non-prison work, and where the prisoner had an option of receiving private treatment.

At the time he ruled on the motion for summary judgment, District Court Judge Terrence W. Boyle had before him: an affidavit by Dr. Atkins stating that he made his own medical decisions according to standards established by the A.M.A.; an affidavit by the North Carolina Division of Prisons Director of Health Services, stating that Dr. Atkins was an independent contractor and not a state employee, and that he exercised his own independent medical judgment when providing medical services to inmates; and a copy of Dr. Atkins' "Contract for Professional Services," indicating that Dr. Atkins was paid nearly $1,000 per week for conducting two orthopedic clinics per week at Central Prison Hospital. There was nothing in the record which indicated

the extent of Dr. Atkins' non-prison practice or the extent to which Atkins depended upon the prison work for his livelihood. Such information was part of the "fact-bound inquiry" required by the Fourth Circuit's decision in Calvert v. Sharp.

Petitioner filed notice of appeal to the Fourth Circuit on June 17, 1985. In an order filed November 18, 1985, the Court of Appeals appointed Richard E. Giroux of North Carolina Prisoner Legal Services, Inc. to represent petitioner Quincy West.

On appeal, petitioner argued both that the facts in his case did not fit into the Calvert decision, and that Calvert was wrongly decided and should be overruled. On September 3, 1986, a panel of the Court of Appeals held that a determination of whether Dr. Atkins was deliberately indifferent to petitioner's serious medical needs should have been made before addressing the issue of whether Dr. Atkins was acting under color of state law for purposes of §1983. The grant of summary judgment to Samuel Atkins was vacated, and the case was remanded to the district court. App. C1-C5.

On November 12, 1986, the court of appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. App. B1. On April 9, 1987 the en banc court refused to overrule or distinguish Calvert v. Sharp, and held that Dr. Atkins was not acting under color of state law for purposes of §1983. App. A1-A19. The court relied on Polk County v. Dodson, 454 U.S. 312 (1981), which held that a public defender does not act under color of state law.

The en banc court dismissed as unpersuasive the several additional factors which the Calvert panel had used to reach its conclusion[1], thereby going beyond Calvert in its scope. The

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[1] The Calvert opinion discussed Polk County, but also stressed the importance of the doctor's minimal contacts with the state prison system: the fact that Dr. Sharp was a privately employed physician who treated private patients as well as inmates; the fact that he did not contract directly with the Maryland state prison system; the fact that he was not dependent on the state for funds; and the fact that the provision of medical services to Maryland inmates was not within the exclusive prerogative of the state. A Maryland statute allowed state prisoners to seek private medical treatment. There was no such possibility that petitioner could obtain private medical care at his own expense.

Fourth Circuit stated that "a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where . . . the professional is a full-time employee of the state." App. A4. The court then stated that "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." App. A5. The dissenting opinion stated that "[t]he rationale employed by the West majority would preclude a §1983 action against any medical professional who has treated a prison inmate since, by virtue of the exercise of their independent, professional judgment, they could never be considered state actors - notwithstanding the holding in Estelle v. Gamble." App. A13. (Harrison L. Winter, Chief Judge, concurring and dissenting).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT BETWEEN THE FOURTH AND ELEVENTH CIRCUITS.

With regard to the issue of whether or not a prison physician is acting under color of state law, there is an irreconcilable conflict between the Fourth and Eleventh circuits. The holding of the Fourth Circuit in this case is in direct conflict with the decisions of the Eleventh Circuit in Ort. v. Pinchback, 786 F.2d 1105 (11th Cir. 1986) and Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985). In Ort v. Pinchback, the district court had dismissed claims against Dr. Pinchback, a private orthopedic surgeon, and Correctional Medical Systems, the entity that oversees Alabama prison medical services. The Eleventh Circuit held that a physician who contracts with the state to provide medical care to inmates acts under color of state law. Referring to its decision in Ancata v. Prison Health Services, the Ort opinion stated that "medical personnel need not be state employees in order that their actions

be considered state action under 42 U.S.C. §1983" and that "the employees of a private entity hired by a county to provide medical care to jail inmates acted under color of state law so as to be subject to liability under §1983." 786 F.2d at 1107. Ancata cited Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), for the proposition that "[w]here a function which is traditionally the exclusive prerogative of the state ... is performed by a private entity, state action is present." 769 F.2d at 703.

Every other circuit which has considered the issue has concluded, at least by implication, that prison physicians act under color of state law when treating incarcerated persons.[2]

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[2] First Circuit: In Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985), the court upheld a jury verdict against a physician, who worked at a jail eight hours per week, in a §1983 action by the survivors of a 19-year-old epileptic who became critically ill as a pre-trial detainee and who died three days after being transferred to a local hospital.

Second Circuit: Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977), affirmed a district court judgment against, among others, a surgical consultant at a women's correctional facility in New York.

Third Circuit: In Norris v. Frame, 585 F.2d 1183 (3rd Cir. 1978), the court remanded a pretrial detainee's §1983 claim against, among others, a prison physician. The trial court had adopted an eighth amendment analysis to evaluate the detainee's claim; the court of appeals remanded for consideration of the claim under fourteenth amendment liberty interest grounds, but there was no question as to whether the physician was acting under color of state law.

Fifth Circuit: In Murrell v. Bennett, 615 F.2d 306 (5th Cir. 1980), a prison physician was sued by a pro se Alabama inmate for alleged failure to provide proper medical treatment. The court reversed the district court's entry of summary judgment. It was assumed that the doctor was acting under color of state law. This decision is consistent with the Fifth Circuit's earlier decision in Robinson v. Jordan, 494 F.2d 793 (5th Cir. 1974), from which Judge Winter cited extensively in his dissent in the opinion below in this case. App. A17-A18.

Sixth Circuit: Byrd v. Wilson, 701 F.2d 592 (6th Cir. 1983), was a §1983 action challenging a prison medical staff's failure to provide adequate medical care at the Kentucky State Penitentiary. The court held that dismissal of the complaint against two prison physicians and other prison personnel was clearly erroneous.

Seventh Circuit: In Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981), a pro se civil rights action against a prison hospital administrator was allowed to proceed until the identity of the members of the medical staff who were likely responsible for the alleged delay in treatment could be designated.

In Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986), an emergency room physician brought a civil rights action against a public hospital and a group of private physicians that employed him, following the termination of his staff privileges. "[T]he conduct of a public hospital and its employees is clearly state action and the conduct of otherwise private entities that act jointly with them is also state action." 784 F.2d at 280.

Calvert v. Sharp has been cited only three times in published federal cases outside the Fourth Circuit, all three times in district court cases, and only once in a fact situation analogous to the case at hand.[3] The opinion below in this case has yet to be cited in a published federal court decision outside the Fourth

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Eighth Circuit: In Hall v. Ashley, 607 F.2d 789 (8th Cir. 1979), the court remanded for a new trial against an orthopedic physician who was under contract to the Arkansas Department of Correction. In footnote 2 at p. 791, the court stated "Nor does any fact issue exist regarding whether Dr. Adams was at all times acting under color of state law."

In Kelsey v. Ewing, 652 F.2d 4 (8th Cir. 1981), the defendant in a §1983 action was a physician who provided medical services at a Minnesota prison pursuant to a contract with the Minnesota Department of Correction. The court said that the district court clearly erred in dismissing Kelsey's claim.

In Mullen v. Smith, 738 F.2d 317 (8th Cir. 1984), an inmate's allegations were held to state an eighth amendment claim sufficient to survive a motion for dismissal. One of the defendants was a prison physician, Dr. Hicks.

See also Lawyer v. Kernodle, 721 F.2d 632 (8th Cir. 1983) (private physician hired by county to perform autopsies was acting under color of state law).

Ninth Circuit: In Broughton v. Cutter Laboratories, 622 F.2d 458 (9th Cir. 1980), a state prisoner brought a pro se §1983 action against, among others, two prison physicians, alleging denial of medical treatment. The court remanded to allow the prisoner to amend his complaint so as to attempt to allege facts sufficient to support an action for deliberate indifference.

See also Briley v. State of Cal., 564 F.2d 849, 853, 856 (9th Cir. 1977) (cited by Judge Winter in his dissent at App. A15) ("private" physician, "while serving as [county] medical examiner and advising at the [plea] bargaining stage, was clearly clothed with the authority of state law, satisfying the 'state action' requirement of §1983").

And in Taylor v. First Wyoming Bank, 707 F.2d 388 (9th Cir. 1983), the court held that the actions of a guardian did not constitute action under color of state law, but stated that the "case would be different if the person requiring care and attention had in effect been made a ward of the state." 707 F.2d at 390.

Tenth Circuit: In Daniels v. Gilpreath, 668 F.2d 477 (10th Cir. 1982), the court held that evidence against a state hospital psychiatrist was insufficient to meet the constitutional standard, presumably holding that the psychiatrist was acting under color of state law.

See also Milonas v. Williams, 691 F.2d 931, 939-940 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983). The court found state action in a private school situation analogous to Rendell-Baker v. Kohn, 457 U.S. 830, in which the plaintiffs were not employees, but students. This is the result which was predicted by the dissent in Rendell-Baker when it assumed that the majority would concede that actions directly affecting the students could be treated as under color of state law since the school is fulfilling the state's obligation to those children. 457 U.S. at 851.

[3] Zingmond v. Harger, 602 F.Supp. 256 (N.D. Ind., 1985), was a §1983 action by a jail prisoner against the sheriff and the county jail alleging, among other things, improper diet and treatment for a diabetic condition. The jail physician was not sued, so the court's comment that "[a] recent and most important distinction has been drawn as to the function of independent

Circuit.

This issue will persist. In the Fourth Circuit, inmates who sue prison physicians under §1983 will have their claims dismissed pursuant to Calvert and the decision in this case; in the Eleventh Circuit, they will be allowed to proceed pursuant to Ancata and Ort. The other circuits, all of which have allowed prisoner lawsuits against prison physicians to proceed, will have to choose between the two approaches when the issue is presented squarely to them. This is an important constitutional issue which has implications more broad than the issue of whether or not a prison physician acts under color of state law, as will be discussed in the next section. The Supreme Court should hear this case to resolve the conflict between the Fourth and Eleventh Circuits and to give guidance to the rest.

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outside physicians engaged to treat inmates" was not relevant to the decision in the case. 602 F.Supp. at 260.

Nash v. Wennar, 645 F.Supp. 238 (D.Vt. 1986), is the only published federal court decision outside the Fourth Circuit which has cited Calvert in a case analogous to the case at hand. Dr. Wennar provided medical services for inmates at a Vermont state prison facility through a contract with the state. In a confusing opinion, the court found that the doctor could fairly be said to be a state actor; that Dr. Wennar, by treating plaintiff under a state contract, was helping the state to fulfill its "public function" of providing medical treatment to state prisoners; and that the provision of medical care to inmates was traditionally within the exclusive prerogative of the state. The court then stated that, although the providing of medical care to state prisoners is generally a "public function" for which the State is responsible, the doctor's alleged conduct was not "fairly attributable" to the State because the doctor worked under separate canons of professional ethics that mandated his exercise of independent judgment on behalf of his patient. This holding, that conduct satisfying the "state action" and "public function" requirements does not satisfy the requirement of action under color of state law, is in apparent conflict with the statement of the Supreme Court that "conduct satisfying the state action requirement of the Fourteenth Amendment satisfies the statutory requirements of action under color of state law . . ." Lugar v. Edmunson Oil Co., 457 U.S. 922, 935, n.18 (1982) (emphasis added).

In King v. Crisp County Hospital Authority, 652 F.Supp. 477 (M.D.Ga. 1987), the district court cited Calvert in a case in which a hospital employee had filed suit alleging that he had been terminated and retaliated against in violation of the Age Discrimination in Employment Act and in violation of his constitutional rights. The court held that a radiologist, who gave hospital administrators his opinion of the plaintiff's performance, was not a "state actor" where he was not an employee of the hospital and he did not have authority to hire or fire hospital employees.

II. THE OPINION BELOW POSES AN IMMEDIATE THREAT TO PRISONERS' RIGHTS TO NECESSARY MEDICAL CARE, AND THREATENS TO UNDERMINE OTHER CONSTITUTIONAL RIGHTS RELATING TO CONDITIONS OF CONFINEMENT

Governments have the exclusive authority to incarcerate. Concomitant with this authority is the constitutional responsibility for the care of inmates. The Supreme Court made this principle clear in Estelle v. Gamble:

> These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authoritites to treat his medical needs; if the authorities fail to do so, those needs will not be met . . ."[i]t is but just that the public be required to care for the prisoner, who cannot be reason of the deprivation of his liberty, care for himself."

429 U.S. 97, 103-4 (citations omitted). If the state can avoid constitutional scrutiny regarding its obligation to provide medical care to state prisoners by delegating governmental functions to private entities, the prisoners' constitutional right to be free from deliberate indifference to serious medical needs while incarcerated could be rendered meaningless.

Under the holding of Calvert v. Sharp, a prisoner who suffers disregard for his serious medical needs at the hands of a physician under contract with the state (not technically a state employee) cannot seek redress in federal court; under the holding of this case, a fellow inmate who suffers the identical mistreatment by a state employee-physician also is foreclosed from asserting an eighth amendment claim as long as the physician is acting in his professional capacity. There is language in the opinion below, moreover, which appears to deny a prisoner's 1983 claim against even a physician who does have custodial or supervisory responsibilities[4] - where the doctor is being sued in matters relating to the exercise of his "independent professional judgment": "a professional, when acting within the bounds of traditional professional discretion and judgment, does not act

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[4] In fact, Dr. Atkins did have custodial and supervisory responsibilities - he supervised nurses and correctional health assistants while performing surgery and conducting clinics, and he had custody over prisoners who had jobs as operating room technicians and nursing assistants.

under color of state law, even where . . . the professional is a full-time employee of the state". App. A4. This negates the constitutional guarantee.

It should be remembered that these decisions do not affect ordinary malpractice actions, which must be brought in the state courts. Rather, the issue is whether a federal forum exists for cases alleging serious, intentional neglect.[5] In Estelle v. Gamble, the Supreme Court, observing that a state has an obligation to provide its prison inmates necessary medical care, held that the "deliberate indifference" of state prison personnel to an inmate's serious illness or injury constitutes cruel and unusual punishment, giving rise to a claim under 42 U.S.C. §1983. As the Court stated, "[t]his is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Estelle, 429 U.S. at 104-05 (emphasis added) (footnotes omitted). Essentially then, the opinion below would overrule Estelle, for the defendant-physician in Estelle was the medical director of the Texas Department of Correction and also the chief medical officer of a prison hospital, but the actual complaint was premised solely on the medical treatment given. Presumably, the physician in Estelle was acting "within the bounds of professional discretion and obligation" (App. A5), when he treated his patients, even though he acted also in a custodial/supervisory capacity.[6]

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[5] N.C. Gen. Stat. §143-300.7 provides for representation by the Attorney General and protection from liability for any person who provides medical services to inmates and who is sued pursuant to the Federal Civil Rights Act of 1871. The State has informed its "contract" physicians that it will not provide representation in malpractice actions. If the opinion below is allowed to stand, the State will be free from providing representatin of any kind for its medical personnel.

[6] Estelle, at 429 U.S. 104, n.10, cites Williams v. Vincent, 508 F.2d 541 (2nd Cir. 1974) (doctor's choosing the "easier and less efficacious treatment" of throwing away the prisoner's ear and stitching the stump may be attributable to "deliberate indifference . . . rather than an exercise of professional judgment").

Historically, maintaining prison facilities has been an exclusive responsiblity of the state and federal governments. However, in recent years governments at all levels increasingly have delegated various prison services to private companies. Prior to the emergence of this practice, there was general agreement that state employees assigned to deal with prisoners acted under color of state law and were accountable in the federal courts if they violated prisoners' constitutionally protected rights. If the opinions of the Fourth Circuit are allowed to stand, the Fourth Circuit will have given the states within its jurisdiction permission to elimate federal review of conditions of confinement by simply contracting with "professionals" for various services.

The need for immediate review of the Fourth Circuit's decision in this case is underscored by the trend of states to contract out, not merely selective services,[7] but entire prison facilities to private companies. Presumably, these contractors could be deemed "professionals" with respect to their occupations. An application of the reasoning of this case to this growing practice suggests that those contractors and their employees will not be held to federal constitutional standards. A logical extension of the Fourth Circuit opinions, then, would be that a state could avoid the reach of the fourteenth amendment over any governmental function merely by "contracting" with "professionals" to administer that function. The door would be open to the wholesale evasion of fourteenth amendment rights; the state could hire private corporations to administer prison units, or even the entire prison system, and thereby avoid liability under §1983 for any violations of inmates' constitutional rights.

The state should not be permitted to avoid constitutional requirements simply by delegating its constitutional and statutory duties. "[I]f this is the basis for delimiting §1983 liability, the state will be free to contract out all services

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[7] There is only one "staff" physician employed at Central Prison Hospital which is the acute care medical facility operated by the State of North Carolina for its more than 17,500 inmates. The remainder of the physicians are "contract" physicians.

which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights whose protection has been delegated to 'private' actors, when they have been denied. Such a result is intolerable " App. A13. (Harrison L. Winter, Chief Judge, concurring and dissenting).

III. THE OPINION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT

A. Polk County v. Dodson Should Not Control This Case

The Fourth Circuit's reliance on Polk County v. Dodson, 454 U.S. 312 (1981), for the proposition that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, is misplaced. The holding of Polk County is a narrow one: "we decide only that a public defender does not act under color of state law when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding." 454 U.S. at 325 (emphasis added). There is no mention in Polk County of the possibility of application of the holding to physicians. Every mention of "independent professional judgment" refers specifically to public defenders. The canons of professional responsibility to which the Polk County opinion refers are canons of the ABA relating specifically to attorneys, not to professionals in general. Language in other Supreme Court cases indicates the narrowness of the Polk County holding. For example, referring to its decision in Polk County, this Court stated: "although state employment is generally sufficient to render the defendant a state actor under our analysis, infra, at 937, it was 'peculiarly difficult' to detect any action of the State in the circumstances of that case." Lugar v. Edmundson Oil Co., 457 U.S. 922, 935, n. 18 (1982) (emphasis added).

The opinion below dismissed petitioner's argument that a public defender's adversarial role distinguishes the public defender from a state-employed physician. The Fourth Circuit concluded that Polk County's discussion of the adversarial role merely "was the basis upon which the Supreme Court concluded that

a professional may act without color of state law even when he is a full-time employee." App. A5. There is nothing in the Polk County opinion to support, or even suggest, this conclusion. There is no discussion in Polk County v. Dodson of the differences between part-time and full-time employees. In fact, the words "full-time" appear only in an introductory paragraph in the first page of the opinion. Polk County concluded that a public defender acts without color of state law because the role of the public defender is adversarial to the interest of the state. The adversarial relationship was the basis for the decision in Polk County, 454 U.S. at 320-22; it was not, as the Fourth Circuit assumed, merely a way to conclude that a "professional may act without color of state law even when he is a full-time employee." App. A5.

The limitation of §1983 liability established on behalf of public defenders by Polk County should not apply to prison doctors. Polk County, in fact, used O'Connor v. Donaldson, 422 U.S. 563 (1975), and Estelle v. Gamble, 429 U.S. 97 (1976) to distinguish public defenders from physicians and to emphasize the adversarial nature of the public defender's role. "Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." Polk County, 454 U.S. at 320.

The Fourth Circuit's statement in the opinion below that "[w]here a professional is acting within the bounds of professional discretion and obligation, his independence from administrative discretion is assured" (App. A5), disregards not only the above statement from Polk County, but also the American Medical Association Standards for Health Services in Prisons (1979). The A.M.A.'s Standards suggest that physicians who treat inmates work closely with the state prison: "The health service program must function as part of the overall institutional program. The Standards call for close cooperation and coordination between the medical staff, other professional staff, correctional personnel and facility administration." Preface at

i. The opinion below also failed to consider the A.M.A.'s elaboration of Standard 102 which reiterates the dual loyalties a prison doctor owes both to the state and the inmate: "The provision of health care is a joint effort of administrators and health care providers and can be achieved only through mutual trust and cooperation." Standard 102 and Discussion.

It is true that the Polk County opinion points out that O'Connor involved claims against a psychiatrist who served as the superintendent at a State mental hospital, and that Estelle involved a physician who was the medical director of the Texas Department of Correction and also the chief medical officer of a prison hospital. However, Estelle did not turn on the supervisory role of the doctor there; the complaint was premised solely on the medical treatment given.[8] "The Polk Court discussed the custodial and supervisory functions of the doctors in Estelle and O'Connor simply in order to highlight the cooperative relationship between the doctors and the state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state." App. A11-A12. (Harrison L. Winter, Chief Judge, concurring and dissenting).

The "fact bound inquiry" requirement of Calvert v. Sharp, 748 F.2d at 862, and Lugar v. Edmundson Oil Co., 457 U.S. 1939, was ignored by the Fourth Circuit in the opinion below. In order to achieve its result, the Calvert panel had used the "fact bound inquiry" approach to arrive at several narrow reasons to substantiate the finding that Dr. Sharp was not acting under color of state law. When presented with a different fact situation, the Fourth Circuit made Polk County's "independent, professional judgment" the sole basis for its holding, thereby

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[8] See Estelle, 429 U.S. at 103; id. at 104, n.10 (citing with approval several court of appeals decisions upholding claims of deliberate indifference without any mention of supervisory and custodial duties). See also Polk County, 454 U.S. at 331 (Blackmun J., dissenting) (noting that claims in Estelle and O'Connor were unrelated to the custodial and supervisory functions of the doctors there).

broadening the impact of the already incorrect decision in Calvert v. Sharp. This approach is an incorrect aberration which stands alone and apart from the other circuits.

B. Calvert v. Sharp, Which The Fourth Circuit Upheld In This Case, Was Decided Wrongly.

As the dissenting opinion in this case concluded, Calvert v. Sharp was decided wrongly, and should have been overruled. Calvert was flawed not only because it relied on Polk County but also because it used the wrong standard to determine "state action." Calvert failed to recognize that a prison doctor, even a private doctor working under a contract, is performing a state function in providing medical services to prisoners, a function which is the exclusive perogative of the State.

Calvert improperly relied on Rendell-Baker v. Kohn, 457 U.S. 830 (1982), which used the "nexus" test of Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). Reliance on Rendell-Baker was misplaced because that case involved a private school on private property; the nexus analysis is inappropriate where the defendant acts on behalf of a state instrumentality such as a unit of the state prison system.[9] The Fourth Circuit panel in Calvert v. Sharp adopted and misapplied the nexus standard. Instead of determining, first, whether the employer was governmental or private and, if private, then applying the nexus test to determine if nonetheless its agents were engaged in state action, the court applied the nexus test to answer the first question. This was incorrect. In Calvert, the employer was governmental, not private, and the court was wrong in looking to the "functions" of a "private physician. 748 F.2d 861. The Burton test should have applied because of the extent and the nature of the overall relationship between the state agency and the "private" enterprise. Burton v. Wilmington Parking

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[9] The dissent in Rendell-Baker stressed that the majority focused on the fact that the actions at issue were personnel decisions, and stated that the majority apparently would concede that actions directly affecting the students could be treated as under color of state law since the school is fulfilling the state's obligations to those children. 457 U.S. 851.

Authority, 365 U.S. 715 (1961). In the prison context, that relationship is dominated by the state's constitutional and statutory responsibility to provide health care to its prisoners.

The correct approach, taken by the Eleventh Circuit in Ancata v. Prison Health Services and Ort v. Pinchback, also has been used by district courts in other circuits in analogous contexts:

> Whether a physician is directly on the state payroll, as in O'Connor, or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the Shriver Center, and because Shriver voluntarily assumed that obligation by contract, Shriver must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if Shriver were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.
>
> Such a treatment of "private" parties as the functional equivalents of state actors is not unprecedented in other contexts. The general principle that private entities act under color of law only if their actions are compelled by rules of decisions imposed by the state also does not apply when such private parties perform functions which are traditionally the exclusive province of the state.

Lombard v. Eunice Kennedy Shriver Center, 556 F.Supp. 677, 680 (D.Mass. 1983);

> Supreme Court decisions suggest that it is exclusively the state's prerogative to confine an individual involuntarily to a mental hospital. ... In addition, while St. Mary is correct in arguing that the provision of medical care is not traditionally dependent on state authority, see Polk County v. Dodson...., more is involved when an individual is involuntarily confined for mental health reasons.
>
> Moreover, once the state curtails an individual's liberty through the civil commitment process, it assumes affirmative obligations, imposed by the Constitution, for the individual's care and well-being.... If the state chooses to delegate these responsibilities, and a private hospital chooses to assume them, neither can then argue that the private hospital's acts and omissions do not occur under the color of state law. ...To hold otherwise would allow the state to avoid its constitutional obligations simply by delegating to private hospitals its responsibility for the care of individuals it involuntarily confines....

Davenport v. Saint Mary Hospital, 633 F.Supp. 1228, 1234 (E.D.Pa. 1986).

Action under color of state law should be found if an otherwise private party performs a function that has been "traditionally the exclusive prerogative of the State." Blum v. Yaretzky, 457 U.S. 991 (1982). The Calvert panel answered the "public function" argument primarily by stressing that Maryland law allows inmates to go outside the prison system to obtain medical care of their choice. However, North Carolina law bars all but minimum security prisoners (which petitioner is not) from exercising such an option. If there was any uncertainty in Calvert that medical care for state prisoners was exclusively within the state's control, such uncertainty is not present in the case at hand. Yet the Fourth Circuit continues to assert, at App. A6, that provision of medical services to inmates is not within the exclusive prerogative of the state. That observation is incorrect in the prison context, where the state has complete control over the circumstances and sources of a prisoner's medical treatment. The state is responsible for attending to inmate medical needs. The provision of medical treatment to inmates, therefore, is a function which is traditionally the exclusive prerogative of the state. A physician who provides such medical treatment to inmates acts under color of state law.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6483 815 F.2d 993

Quincy West,

Appellant,

versus,

Samuel Atkins; Rae McNamara;
James B. Hunt,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (CA 84-1346-CRT).

Argued: December 8, 1986 Decided: April 9, 1987

Before WINTER, Chief Judge RUSSELL, WIDENER, HALL, PHILLIPS, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS Circuit Judges, sitting en banc.

Richard E. Giroux, North Carolina Prisoner Legal Services, Inc. on brief for appellant; Jacob L. Safron, Special Deputy Attorney General (Lacy H. Thornburg, Attorney General on brief) for appellee.

CHAPMAN, Circuit Judge:

In Calvert v. Sharp, 748 F.2d 861, 863 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985), we held that "[t]he professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical services to an inmate." Prisoner West brought this § 1983 action against a private physician who was under contract for part-time employment with the state to provide two orthopedic clinics per week at North Carolina Central Prison Hospital. Because we perceive no valid reason to overrule or distinguish Calvert, we affirm the district court's dismissal of the appellant's claim.

I.

West tore the Achilles tendon in his left leg while playing basketball on July 30, 1983. Dr. Atkins examined West and concluded that surgery could be avoided if the tendon would grow back together by itself. Atkins therefore placed West's leg in a cast and prescribed medication. West has alleged that the attention given to his injured leg was so inadequate as to be actionable under 42 U S.C. § 1983.

North Carolina Central Prison Hospital, where West is imprisoned, has one full-time staff doctor, with additional medical services provided under "contracts for professional services" with area doctors. Dr. Atkins, by contract, conducted two clinics per week at the prison. Atkins also maintained a private practice. It does appear that, because West is a prisoner in "close custody," he is not free to seek outside medical assistance.

West's § 1983 theory alleged a denial of his right to be free from cruel and unusual punishment, as defined by the Eighth Amendment. West sought compensatory and punitive damages from Dr. Atkins, compensatory and punitive damages from Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Corrections, and a declaratory judgment against James B. Hunt, Governor of the State of North Carolina.

II.

The Supreme Court held in Estelle v. Gamble, 429 U.S. 97 (1976), that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the Eighth Amendment and can support a § 1983 action. To establish a § 1983 claim, a plaintiff must also show that the defendant acted under color of state law, an element which was not in issue in Estelle. The Supreme Court addressed the requirements for establishing that a defendant, who is a professional, acted under color of state law in the case of Polk County v. Dodson, 454 U.S. 312 (1981). Dodson held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 325 (footnote omitted). Instead, "[h]eld to the same standards of competence and integrity as a private lawyer, . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." Id. at 321. The court noted, moreover, that "[b]ecause of their custodial and supervisory functions, the state-employed doctors in [O'Connor v. Donaldson,

422 U.S. 563 (1975)] and Estelle faced their employer in a very different posture than does a public defender." Dodson at 320. Thus the clear and practicable principle enunciated by the Supreme Court, and followed in Calvert, is that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in Dodson, the professional is a full-time employee of the state.[1] Where the professional exercises custodial or supervisory authority, which is to say that he is not acting in his professional capacity, then a § 1983 claim can be established, provided the requisite nexus to the state is proved.

In Calvert an inmate sued a private orthopedic specialist for an alleged failure to treat. The defendant was employed by a non-profit professional corporation, which in turn contracted with the state. We held that because private physicians exercise independent, professional judgment and render medical care in accordance with professional obligations, a physician when rendering such medical services does not act under

[1] Dodson held that the employment relationship is only a "relevant factor" in determining whether the professional acted under color of state law. The primary consideration, established in Dodson, is the defendant's "function." Thus, the plaintiff would have to prove that the employment relationship created such an overbearing environment that the exercise of the independent professional judgment, the primary test, was impossible. The simple allegation of a close employment relationship between the state and the professional, absent any proof that that relationship had the effect of precluding independent judgment, is insufficient to satisfy the "color of state law" element of a § 1983 claim. The employment relationship is but one factor in determining whether the professional exercised independent judgment.

color of state law. The defendant in Calvert had no supervisory or custodial functions.

We find the reasoning suggested by the appellant to differentiate the rule in Dodson from that enunciated in Calvert unpersuasive. Although the opinion in Dodson does point out that a public defender in effect plays a role adversarial to the interests of the state, that reasoning was the basis upon which the Supreme Court concluded that a professional may act without color of state law even when he is a full-time employee. In other words, even a full-time employee who is a professional can act without color of state law where his role in essence is adversarial to the interests of the state. Thus, "a public defender is not amenable to administrative direction in the same sense as other employees of the State." Dodson at 321. We do not need to address the problematic issue of whether the nature of the doctor-patient relationship can at times be adverse to the interests of the state. Where the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured.

The appellant is probably correct in his argument that the rule enunciated in Dodson, and followed in Calvert, has the effect of limiting the range of professionals subject to an Estelle action. This effect, however, is entirely consonant with the requirements of § 1983, which statute subjects the individual to liability only where he has acted under color of state law in violating a constitutional right. In any event, it is not for

this court to tamper with the limitation of § 1983 liability established in Dodson. We therefore decline to overrule Calvert v. Sharp.[2]

III.

The appellant suggests that should this court decline to overrule its prior decision, we should distinguish it. We decline to do so. The fact that the doctor in Calvert was employed by a professional corporation, which in turn had contracted with the state, whereas Dr. Atkins, a sole practitioner, entered into that contract himself, makes no difference. A professional exercises his professional discretion pursuant to his professional obligations whether he practices alone or in a group. The effect of adopting the distinction suggested by the appellant would be to absolve one professional from liability concerning the same course of conduct and wilful failure to treat undertaken by another professional simply on the grounds that the former had associated himself with a group practice. Liability for a constitutional violation arising from a wrong done to an inmate should not rest on the contractual arrangement entered into by the putative defendant with third parties. The effect of such a rule would be to discourage any professional not associated with a group practice from serving the medical needs of prisoners. Such a rule would have the

[2] We also reject appellant's contention that the provision of medical services to the inmates is an "exclusive state function." Decisions made in the day-to-day rendering of medical services by a physician are not the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. See Blum v. Yaretsky, 457 U.S. 991, 1012 (1982).

deleterious effect of increasing the cost and reducing the availability of medical services for prisons.

The other grounds of distinction proffered by the appellant are equally unpersuasive.

IV.

We find no reason to disturb the district court's dismissal of the appellant's claims against appellees McNamara and Hunt. Pursuant to 28 U.S.C. § 1915(d), claims made by pro se litigants can be dismissed if frivolous: that is, if "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Boyce v. Alizaduh, 595 F.2d 948, 951 (4th Cir. 1979), quoting Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

Respondeat superior is not available for § 1983 actions, and so the appellant must allege personal involvement by appellees Hunt and McNamara in the deprivation of his constitutional rights. Because the alleged deprivation of constitutional rights in this case involved the alleged failure to render medical services properly, the "personal involvement" of these appellees must be relevant to the alleged deprivation. The appellant has alleged no facts which would show that appellees McNamara or Hunt had the authority to overrule the

medical judgment of Dr. Atkins. The fact that the appellant had mailed to appellee McNamara two letters complaining about Dr. Atkins' treatment does not suffice to render McNamara liable for Atkins' medical judgments. We therefore affirm the district court's dismissal of these claims.

AFFIRMED.

WINTER, Chief Judge, concurring and dissenting:

When the panel heard this appeal, it could not, under our established practice, question the correctness of the holding in Calvert v. Sharp, 748 F.2d 861 (4 Cir. 1984), cert. denied, 471 U.S. 1132 (1985). At most, it could seek to distinguish Calvert, if a reasonable basis for distinction could be developed, or it could conclude that the correctness of Calvert was not presented because the physician who treated West was not guilty of deliberate indifference to West's serious medical needs. The panel opinion, in which I joined, pursued much the latter course. It sought to have the district court determine whether the physician was chargeable with deliberate indifference so that the necessity of addressing the correctness or distinguishability of Calvert could be certain.

An in banc court possesses greater authority. It is free to re-examine the correctness of the court's precedents and to overrule them if it determines that they were incorrectly decided. As a member of the in banc court, I am of the view that Calvert is an aberration and that it should be overruled. Alternatively, I think that Calvert should be confined to its facts and that this case is sufficiently different so as to render Calvert inapplicable.

I would therefore reverse the summary judgment in favor of Dr. Atkins, and I respectfully dissent from the majority's contrary decision. I concur, however, in affirming the dismissal of

the action against McNamara and Hunt.[1]

I.

There are several grounds for concluding that services rendered by prison doctors -- whether permanent members of a prison medical staff, or under limited contract with the prison -- constitute action "under color" of state law, for purposes of § 1983, and that, as a consequence, Calvert was wrongly decided.

A. Prison doctors are state actors

Without doubt such state employees as prison guards and wardens are "state actors" subject to § 1983 liability. Moreover, the panel in Calvert implicitly conceded that a doctor who is (1) permanently employed on the medical staff of a prison, and (2) who has "custodial and supervisory duties" acts "under color of state law" when treating prisoners. The question then becomes whether the absence of either of these factors requires a different conclusion. I think not.

All employment relationships are regulated by contract. The fact that the contractual arrangement between Dr. Atkins and the prison does not require Dr. Atkins to work exclusively for the prison should not strip his conduct of its essentially governmental nature when he is performing such service. Indeed, as the majority opinion notes, "[l]iability for a constitutional violation arising from a wrong done to an inmate should not rest on

[1] The record contains no evidence that Hunt had notice of West's complaints and, in my view, such evidence is so scant as to McNamara's notice that I perceive no basis on which to hold them liable. Of course, § 1983 does not recognize liability under the

the contractual arrangement entered into by the putative defendant with third parties." Ante at 6.

The absence of custodial and supervisory functions is equally irrelevant to the state action issue. Although the Supreme Court, in Polk County v. Dodson, 454 U.S. 312, 319-21 (1981), invoked this factor to contrast the role of the public defender in Polk with that of the doctors in Estelle v. Gamble, 429 U.S. 97 (1976) and O'Connor v. Donaldson, 422 U.S. 563 (1975), I think that the Calvert panel misapplied this discussion in Polk. Estelle did not turn on the supervisory role of the doctor there; the complaint was premised solely on the medical treatment given. See Estelle, 429 U.S. at 103; id. at 104, n.10 (citing with approval several court of appeals decisions upholding claims of deliberate indifference without any mention of supervisory and custodial duties). See also Polk, 454 U.S. at 331 (Blackmun J., dissenting) (noting that claims in Estelle and O'Connor were unrelated to the custodial and supervisory functions of the doctors there). I think it clear that Polk turned on the inherently adversarial relationship between public defenders and the state. 454 U.S. at 320-22.[2] The Polk Court discussed the custodial and supervisory functions of the doctors in Estelle and O'Connor simply in order to highlight the cooperative relation-

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[1] Cont. doctrine of respondeat superior.

[2] Although Calvert asserts that "[t]he loyalty owed by Dr. Sharp was potentially adverse to the interests of the state," 748 F.2d at 863, no basis for this speculation is offered, nor does one readily spring to mind.

ship between the doctors and the state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state. There is no suggestion that performance of custodial and supervisory duties is a prerequisite for a finding that doctors act under color of state law. Indeed, such a requirement would bar many deliberate indifference claims: it seems unlikely that those with supervisory and custodial functions will often be directly involved with patient care, yet § 1983 is not available for claims based on the principle of respondeat superior.

There is no significant difference between the doctor-employees in Estelle and O'Connor, and Drs. Atkins and Sharp. While Dr. Sharp had a contract with a professional association which, in turn, had a contract with the state, it is fair to say that each of these doctors worked under contract with the state, received payment from state funds, were subject to regulation by state and professional review boards, and performed services that the state is obligated to provide to prison inmates.

The majority's assertion in this case, that where a "professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured" (ante at 5), is supported by nothing in the record, and completely disregards the American Medical Association Standards for Health Services in Prisons (1979), that prescribe the relationship between medical personnel and other prison officials as one of "close cooperation and coordination"; a "joint effort."

Preface at i; Std. 102 & Discussion. The rationale employed by the majority would preclude a § 1983 action against any medical professional who has treated a prison inmate since, by virtue of the exercise of their 'independent professional' judgment, they could never be considered state actors -- notwithstanding the holding in Estelle v. Gamble.

Defendants' brief argues that contractual medical service providers are "independent contractors rather than . . . employees," noting that no social security taxes are withheld from their paychecks and they receive no benefits enjoyed by state employees. But if this is the basis for delimiting § 1983 liability, the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to "private" actors, when they have been denied. Such a result is intolerable.

B. "Public Function" Rationale

Action "under color" of state law will be found if an otherwise private party performs a function that has been "traditionally the exclusive prerogative of the State." Blum v. Yaretzky, 457 U.S. 991, 1011 (1982). The incarceration of convicted criminals surely falls within that category. And because "[a]n inmate must rely on prison authorities to treat his medical needs. . . [it is] the government's obligation to provide medical care for those whom it is punishing by incarceration . . . . '[I]t is but just that the public be required to care for the prisoner, who

cannot by reason of the deprivation of his liberty, care for himself.'" Estelle, 429 U.S. at 103-04 (emphasis added) (citations omitted). Accord Bowring v. Godwin, 551 F.2d 44, 46-47 (4 Cir. 1977).

The panel in Calvert, 748 F.2d at 864, and the majority opinion here, ante at 6 n.2, asserted that medical care is not within the exclusive prerogative of the state. That observation, however, is incorrect in the prison context, where the state has complete control over the circumstances and sources of a prisoner's medical treatment.[1] The view espoused here has been explicitly endorsed in other cases where the doctor operates under contract to the state. A good example is Ort v. Pinchback, 786 F.2d 1105, 1107 (11 Cir. 1986):

> . . . we hold that the district court erred as a matter of law in concluding that a physician who contracts with the state to provide medical care to inmates does not act under color of state law. In Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985), we pointed out that medical personnel need not be state employees in order that their actions be considered state action under 42 U.S.C. § 1983. We held that the employees of a private entity hired by a county to provide medical care to jail inmates acted under color of state law so as to be subject to liability under § 1983. Id. at 703. Dr. Pinchback similarly performed "a function which is traditionally the exclusive prerogative of the state" when he took over the state's responsibility for attending to inmate medical needs. Id.; see Morrison v. Washington County, Ala., 700 F.2d 678, 683 (11th Cir. 1983).

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1 Although in Calvert, and unlike the situation in this case, the prisoners were allowed to go outside the prison to a doctor of their choice, this privilege was available only by virtue of a state statute. 748 F.2d at 864.

See also Hall v. Ashley, 607 F.2d 789 (8 Cir. 1979) (upholding § 1983 deliberate indifference action against orthopedic surgeon operating under contract to prison). Cf. Briley v. State of Cal., 564 F.2d 849, 853, 856 (9 Cir. 1977) ("private" physician, "while serving as [county] medical examiner and advising at the [plea] bargaining stage, was clearly clothed with the authority of state law, satisfying the 'state action' requirement of § 1983").

C. "Joint Action" Rationale

"It is enough that [a private party] is a willful participant in joint activity with the State or its agents" to render him liable under § 1983. United States v. Price, 383 U.S. 787, 794 (1966). Accord Lugar v. Edmondson Oil Co., 457 U.S. 922, 931-32 (1982). Thus, even if we assume that the doctor is not a public employee, the integral role that he plays within the prison medical system nevertheless qualifies his actions therein as "under color" of state law. The AMA Standards for Health Services in Prisons, described supra, provide that medical personnel and other prison officials are to operate in "close cooperation and coordination" with each other, in a "joint effort." There is no reason to believe that this mandate applies differently depending on the nature of the employment contract between doctor and prison.

It is significant to note that the Supreme Court in Polk recognized the viability of the joint participation rationale, but found it inapplicable to the adversarial relationship between

the state and the public defender in that case. 454 U.S. at 322 n.12. More significant is the subsequent decision in Tower v. Glover, 467 U.S. 914 (1984), where the Court held that even a public defender acts under color of state law when he conspires with state officials to deprive another of constitutional rights. The same principle holds for prison doctors.

D. Impact of relationship with the state

Critical to Calvert's conclusion that the doctor did not act under color of state law was the panel's repeated assertion that the doctor-patient relationship was in no way changed by virtue of the doctor's employment by the state. 748 F.2d at 863-64. From this the panel concluded that the doctor was an independent actor, rather than a true agent of the state. However, this position ignores the AMA standards cited supra, which dictate close cooperation between the doctor and other state officials. Conversely, to the extent that Calvert is correct in its description of the ethical obligations of physicians, 748 F.2d at 863, these obligations would be the same for the medical decisions of the staff doctors in Estelle and O'Connor, who are acknowledged to act under color of state law.

Thus I conclude that Calvert is fatally flawed. It should not be followed here. Indeed, it should be overruled. Consistent with Estelle and O'Connor, Dr. Atkins should be found to have acted under color of state law in providing medical care to West.

II.

Even if my rejection of Calvert is not well-founded, I do not believe that decision controls the outcome here. I perceive the following valid bases for distinguishing this case from Calvert:

A. Absence of prisoner-patient choice of doctor/medical care

Although it argued that diagnosis and treatment are not the exclusive prerogative of the state, the Calvert panel answered the "public function" argument primarily by stressing that Maryland law allows inmates to go outside the prison and obtain medical care of their choice. In this case, however, North Carolina law bars all but minimum security prisoners (which West is not) from exercising such an option. West was thus totally dependent on the state's chosen medical care providers; for West, that meant Dr. Atkins. If there was any uncertainty in Calvert that the medical care received by that plaintiff was exclusively within the state's control, such uncertainty is not present in this case. Dr. Atkins was chosen by North Carolina to fulfill the state's constitutional obligation to provide inmates like West with adequate medical care. North Carolina should not be permitted to plead a lack of responsibility because it delegated the task to a "private" party.

The Fifth Circuit adopted this view in Robinson v. Jordan, 494 F.2d 793, 794-95 (5 Cir. 1974):

> The trial judge alternatively stated: "It additionally appears that a doctor hired to treat prisoners is not acting under color of state law . . . . This holding was erroneous since Dr. Gates acted solely in his official capacity as a county health officer in treating appellant. This was state action . . . . Dr. Gates was not acting as a private physician but treated Robinson at the Sheriff's request because of his official employment.
>
> The cases relied on by the district judge holding that suits may not be maintained under Section 1983 against privately retained attorneys or court-appointed attorneys are inapposite. Robinson's detention prevented his seeking a physician of his choice. He did not enjoy the option of dismissing his doctor and securing another such as that open to a client dissatisfied with an attorney, appointed or retained. He was required to depend totally upon Dr. Gates, the county physician. (citations omitted)

B. Dependence on the state

Although Calvert found Dr. Sharp to have abundant non-state resources, 748 F.2d at 863, it appears (although the record is too sparse to be certain) that Dr. Atkins was heavily dependent on state funds. Moreover, it seems that Dr. Atkins' private practice, outside the prison, was significantly more limited than Dr. Sharp's. The risk that Dr. Atkins would feel compelled to adapt his medical judgments to accommodate his state employer, in conformity with the AMA's mandate to cooperate with the state, is far greater in these circumstances.

C. Absence of an intermediary

Dr. Atkins was employed directly by the state, much as any other state employee, including the doctors in Estelle and O'Connor. Dr. Sharp, however, was employed by a private association, which in turn was under contract to the state -- a factor emphasized in Calvert, 748 F.2d at 863. The presence of the

intermediary in Calvert helped to insulate Dr. Sharp from state administrative influence and pressure -- a buffer unavailable to Dr. Atkins in this case.

These considerations serve to distinguish Calvert and to limit it to its discrete facts. If Calvert is not to be overruled, and it is my preference to do so, I think that it should be so limited.

For these reasons, I would reverse the summary judgment for Dr. Atkins that was granted by the district court and remand the case for further proceedings. In short, I would hold that Dr. Atkins acted under color of state law in treating West, and I would direct the district court to determine if Dr. Atkins is chargeable with deliberate indifference to West's medical needs.

Judge Phillips and Judge Ervin authorize me to say that they join in this opinion.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

No. 87-5096

QUINCY WEST,

Petitioner,

v.

SAMUEL ATKINS,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I.

DID A PHYSICIAN WHO WAS UNDER CONTRACT TO PROVIDE ORTHOPEDIC SERVICES TO INMATES AT A STATE PRISON HOSPITAL ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF § 1983 IN HIS TREATMENT OF A NORTH CAROLINA STATE PRISON INMATE?

II.

DO PRISON PHYSICIANS - WHETHER PERMANENT MEMBERS OF A STATE PRISON MEDICAL STAFF, OR UNDER CONTRACT WITH THE STATE PRISON SYSTEM - ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF § 1983 LIABILITY IN THEIR TREATMENT OF STATE PRISON INMATES?

PARTIES

The parties to the proceedings below were the petitioner Quincy West, an inmate in the custody of the North Carolina Department of Correction, and defendants Samuel Atkins, Rae McNamara and James B. Hunt. Samuel Atkins was a physician acting under contract to the North Carolina Department of Correction to provide orthopedic services at North Carolina Central Prison Hospital at Raleigh, North Carolina, Rae McNamara was the former Director of the Division of Prisons of the North Carolina Department of Correction and James B. Hunt was the former Governor of the State of North Carolina.

The District Court dismissed the claims against defendants McNamara and Hunt as frivolous and the Fourth Circuit Court of Appeals dismissed the plaintiff's interlocutory appeal of that Order on April 23, 1985. On September 3, 1986, a panel of the Fourth Circuit affirmed the dismissal of Defendant Hunt, but vacated the dismissal of Defendants Atkins and McNamara.

In its en banc decision, the Fourth Circuit reaffirmed the District Court's dismissals of Defendants Atkins, McNamara and Hunt. Petitioner West does not challenge the dismissals of Defendants McNamara and Hunt and thus Defendant Samuel Atkins, a

physician formerly under contract to provide orthopedic services at North Carolina Central Prison Hospital, is the only respondent in the Petition for Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

No. 87-5096

QUINCY WEST,

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Respondent

BRIEF OF RESPONDENT
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

OPINIONS BELOW

In an en banc opinion filed April 9, 1987 reported 815 F.2d 993 (4th Cir. 1987), the Fourth Circuit Court of Appeals dismissed the Petitioner's Complaint filed pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, against Samuel Atkins, a physician formerly under contract to provide two orthopedic clinics a week at North Carolina Central Prison Hospital, Rae McNamara, former Director of the Division of Prisons of the North Carolina Department of Correction, and James B. Hunt, former Governor of the State of North Carolina. A copy of the en banc decision is attached as Exhibit A to Petitioner West's Petition for Writ of Certiorari.

The September 3, 1986 panel opinion of the Fourth Circuit Court of Appeals is reported at 799 F.2d 923 (4th Cir. 1986). The panel affirmed the dismissal of Defendant Hunt, but vacated the dismissals of Defendants Atkins and McNamara. A copy of the panel decision is attached as Exhibit B to the Petition for Writ of Certiorari. On November 12, 1986, the Fourth Circuit Court of Appeals ordered that the decision of the panel be vacated and set

the case for oral argument before the en banc court.

The June 7, 1985 Order of the United States District Court for the Eastern District of North Carolina dismissing the claims against Defendants Atkins, McNamara and Hunt is not reported and is attached as Exhibit D to the Petition for Writ of Certiorari.

From the en banc opinion of the Fourth Circuit Court of Appeals, West has filed this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, or regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE AND FACTS

West tore the Achilles tendon in his left leg above his heel string while playing basketball on July 30, 1983 at the Odom Correctional Center at Jackson, North Carolina. Dr. Samuel Atkins, a physician on contract to provide two orthopedic clinics per week at North Carolina Central Prison Hospital at Raleigh, North Carolina, examined West and concluded that surgery could be avoided if the tendon would grow back together by itself. Atkins therefore placed West's leg in a cast and prescribed medication. On November 29, 1984, West filed a Pro Se complaint pursuant to 42 U.S.C. § 1983 against Dr. Atkins, James B. Hunt, Governor of the State of North Carolina, and Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Correction. In the complaint West alleged that Dr. Atkins

> ... through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for badly torn Achilles tendon ...

As a result, West sought $1,000,000.00 in compensatory and $500,000.00 in punitive damages from Dr. Atkins, $640,000.00 in compensatory and $360,000.00 in punitive damages from Director McNamara, and a declaratory judgment against Governor Hunt.

The District Court made a determination of frivolity under 28 U.S.C. § 1915(d) and dismissed the claims against Hunt and McNamara and the Fourth Circuit Court of Appeals dismissed West's interlocutory appeal from that Order on April 3, 1985. WEST v. ATKINS, 760 F.2d 266 (4th Cir., April 3, 1985) (No. 85-6092) [Unpublished].

On June 7, 1985, citing CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985), for the proposition that Dr. Atkins was not acting under color of state law for the purposes of § 1983, the District Court allowed Dr. Atkins' Motion for Summary Judgment and dismissed West's complaint. [Petitioner's Exhibit D]. Petitioner filed Notice of Appeal to the Fourth Circuit on June 17, 1985 and on September 3, 1986 a panel of the Court held that a determination of whether Dr. Atkins was deliberately indifferent to West's serious medical needs should have been made before addressing the issue of whether Dr. Atkins was acting under color of state law for the purposes of § 1983. The grant of Summary Judgment to Dr. Atkins and Director McNamara's dismissal under the determination of frivolity under 28 U.S.C. § 1915(d) was vacated and the case remanded to the District Court. [Petitioner's Exhibit C].

On November 12, 1986, the Court ordered that the decision of the panel be vacated and the case set for oral argument before the en banc court. [Petitioner's Exhibit B]. On April 9, 1987 the en banc court perceived no valid reason to overrule or distinguish CALVERT v. SHARP, supra, and in reliance on POLK COUNTY v. DODSON, 454 U.S. 312 (1981), dismissed West's claims holding that Dr. Atkins was not acting under color of state law for purposes of § 1983. [Petitioner's Exhibit A]. From this

decision, Petitioner West seeks a Writ of Certiorari from this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

LACK OF FEDERAL COURT JURISDICTION

West tore the Achilles tendon in his left leg while playing basketball on July 30, 1983. Dr. Atkins, an orthopedic surgeon who maintains a private practice at Raleigh, North Carolina and was under contract to conduct two orthopedic clinics per week at North Carolina Central Prison Hospital at Raleigh, examined West and concluded that surgery could be avoided if the tendon would grow back by itself. Dr. Atkins therefore placed West's leg in a cast and prescribed medication. In the complaint filed November 29, 1984 West alleged that Dr. Atkins

> ... through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for a badly torn Achilles tendon. ...

The issue presented to this Court is identical to CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132, 105 S.Ct. 2667, 86 L.Ed.2d 283 (1985). In CALVERT the Fourth Circuit Court of Appeals reasoned as follows:

> To maintain a § 1983 action a plaintiff must establish a jurisdictional requisite that the defendant acted under color of state law. POLK COUNTY, 454 U.S. at 315. A person acts under color of state law "only when exercising 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Id. at 317-18 (quoting UNITED STATES v. CLASSIC, 313 U.S. 299,326 (1941)). The ultimate issue in determining if a person is subject to suit under § 1983 is whether the alleged infringement of federal rights is fairly attributable to the state. RENDELL-BAKER v. KOHN, 457 U.S. 830, 838 (1982). ...
>
> *****
>
> Unlike the attorney in POLK COUNTY, Dr. Sharp is privately employed. Private physicians exercise their own judgment and make their own medical decisions according to standards not established by the state. BLUM v. YARETSKY, 457 U.S. 991, 1008-09 (1982). Their physician-patient relationships are the same, with the same obligations and duties,

> both within and without the prisons walls. A private physician is not, and by the nature of his function cannot be the servant of an administrative superior. See The American Medical Association Standards for Health Services in Prisons (Standard 102 states: "Matters of medical ... judgment are the sole province of the responsible physician.") (Emphasis in original). The American Medical Association Principles on Medical Ethics; The Hippocratic Oaths. The ethical obligations of physicians date back to the time of the ancient Greeks. E.g., the Hippocratic Oath.
>
> In his brief Calvert recognizes that a physician owes his ethical obligation and undivided loyalty to his patient. The loyalty owed by Dr. Sharp was potentially adverse to the interests of the state. Dr. Sharp had no supervisor or custodial functions. Compare POLK COUNTY with ESTELLE v. GAMBLE, 429 U.S. 97 (1976), and O'CONNOR v. DONALDSON, 422 U.S. 563 (1975) (in ESTELLE v. GAMBLE the physicians were employed directly by the state and had custodial or supervisory functions. Sharp's functions and obligation was solely to cure orthopedic problems.
>
> In exercising his judgment in the treatment of inmates, the private physician performs a private function traditionally filled by retained physicians. The professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical service to an inmate. See HALL v. QUILLEN, 631 F.2d 1154 (4th Cir. 1980); see also BLUM, 457 U.S. at 1008-09; cf. POLK COUNTY 454 U.S. at 319-24 (in which the Supreme Court discusses the obligations and functions of attorneys).
>
> *****
>
> Calvert and the trial court rely on ESTELLE v. GAMBLE to support the position that Dr. Sharp acted under color of state law by denying him medical attention. This reliance is misplaced. ESTELLE establishes that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the Eighth Amendment and can support a § 1983 action. Nevertheless, a plaintiff must still establish that the defendant acted under color of state law. POLK COUNTY, 454 U.S. at 315. ESTELLE does not mandate, as CALVERT claims and the trial judge held, that a person who violates an inmate's Eighth Amendment rights is automatically acting under color of state law. Whether the physician acted under color of state law was not an issue in ESTELLE.
>
> Furthermore, in POLK COUNTY, the Supreme Court distinguished ESTELLE and O'CONNOR v. DONALDSON, 422 U.S. 563 (1975) as follows:
>
> O'CONNOR involves claims against a psychiatrist who served as the

> superintendent at a state mental hospital. Although a physician with traditionally private obligations to his patients, he was sued in his capacity as a state custodian and administrator. Unlike a lawyer, the administrator of a state hospital owes no duty of "undivided loyalty" to his patients. On the contrary, it is his function to protect the interest of the public as well as that of his wards. Summarily, ESTELLE involved a physician who was the medical director of the Texas Department of Corrections and also the Chief Medical Officer of a prison hospital. He saw his patients in a custodial as well as a medical capacity.
>
> Because of their custodial and supervisory functions, the state employed doctors in O'CONNOR and ESTELLE faced their employer in a very different posture than does a public defender. Institutional physicians assume an obligation to the mission that the state, through the institution, attempts to achieve.

POLK COUNTY, 454 U.S. at 320.

> Dr. Sharp is a privately employed specialist who treats private patients as well as inmates. He did not have any custodial or supervisory duties. His obligation was not to the mission of the state but to treat patients referred to him by other physicians. He did not act under color of state law.

In this case Dr. Atkins was not acting under color of state law. This result is dictated by CALVERT v. SHARP, supra. In that case a Maryland inmate brought a § 1983 action against the doctor for violation of his Eighth Amendment rights. The defendant doctor was a private orthopedic surgeon employed by Chesapeake Physicians, P.A. (CPPA), a non-profit corporation, employing numerous physicians and health personnel. CPPA provided medical services to the general public and also medical services to inmates through a contract with the State of Maryland. Calvert was referred to Dr. Sharp on five separate occasions from July 1980 to December 1981. Calvert alleged that Dr. Sharp did not treat him on these visits.

In CALVERT, the Fourth Circuit outlined four factors for a Court to apply when faced with the issue of whether a medical professional acted "under color of state law" when rendering

medical services to a state prisoner. The Court must ask:

1. Was there a "sufficiently close nexus" between the state and the medical professional's performance of his or her duties for the prison system, so that his or her conduct in these duties must be treated as that of the state itself?

2. In providing the medical services, was the medical professional exercising a function "traditionally the exclusive prerogative of the state"?

3. In providing the medical services, was the medical professional exercising his or her independent medical judgment without regard to state interests or deference to state authorities?

4. Was the medical professional performing any custodial or supervisory duties for the state prison system?

These factors must be balanced when determining whether the medical professional's actions were fairly attributable to the state. CALVERT at 862.

In holding that the defendant doctor did not act under color of Maryland law, the Fourth Circuit said "the professional obligation and functions of a private physician establish that such physician does not act under color of state law when providing medical services to an inmate." CALVERT at 863. On the contrary, privately employed physicians exercise their individual judgment and make their own decisions according to standards not established by the state. In fact the physician's loyalty is to his patients and is often adverse to the state. Id. The Fourth Circuit also noted that the defendant was not "dependent upon state funds" or performing a "public function," two factors considered to determine if a private act is done under color of state law.

The situation presented in this case is very similar to one presented in CALVERT. Specifically, Dr. Atkins is a private physician who contracted with the North Carolina Department of Correction to provide two orthopedic clinics per week to inmates at North Carolina Central Prison Hospital. Pursuant to the contract, Dr. Atkins received a weekly payment for his services but did not receive employee benefits. The doctor performed only medical duties and functions and did not have any supervisory or

custodial functions at Central Prison Hospital.

That the contract is a direct contract between Dr. Atkins and the state, unlike the situation in CALVERT where there was an intervening general contractor, does not dictate a different result. "Acts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." RENDELL-BAKER v. KOHN, 457 U.S. 830, 841, 102 S.Ct. 2764, 73 L.Ed.2d 418, 427 (1982). In RENDELL-BAKER this Court stated that:

> The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.
>
> The school is also analogous to the public defender found not to be a state actor in POLK COUNTY v. DODSON, 454 U.S. 312, 70 L.Ed.2d 509, 102 S.Ct. 445 (1981). There we concluded that, although the state paid the public defender, her relationship with her client was "identical to that existing between any other lawyer and client." Id. at 318. Here the relationship between the school and its teachers and counselors is not changed because the state pays the tuition of the students.

The relationship between doctor and patient does not change because the state pays for the doctor. Dr. Atkins exercised independent medical judgment without regard to state authorities. Clearly, the balance weighs against finding that Dr. Atkins acted "under color of state law." A person acts under color of state law "only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" POLK COUNTY v. DODSON, 454 U.S. 312, 317, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), quoting UNITED STATES v. CLASSIC, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). In this case Dr. Atkins was not acting under color of state law.

II.

WEST'S EIGHTH AMENDMENT CLAIM

In order for an inmate to bring a claim of inadequate

medical care under 42 U.S.C. § 1983 the mistreatment or nontreatment must be capable of characterization as cruel and unusual punishment. Before a federal court will interfere with the internal operations of a state penal facility a prisoner's allegations must reach constitutional dimensions. RUSSELL v. SHEFFER, 528 F.2d 318 (4th Cir. 1975). However, "where a prisoner has received some medical attention and a dispute is over the adequacy of the treatment, federal courts are generally reluctant to second-guess medical judgments and to constitutionalize claims which sound in state tort law." WESTLAKE v. LUCAS, 537 F.2d 857, 860 n. 5 (6th Cir. 1976).

In order to recover for a denial of medical treatment, the plaintiff must show deliberate indifference to serious medical needs. The test is whether such deliberate indifference would offend "evolving standards of decency" in violation of the Eighth Amendment. The complaint that a medical professional has been negligent in diagnosing the medical condition does not state a valid claim under the Eighth Amendment. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." ESTELLE v. GAMBLE, 429 U.S. 97, 107, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

III.

WEST'S NEGLIGENCE CLAIM

In any event, even if the district court had jurisdiction over Dr. Atkins, which it did not, under BAKER v. McCOLLAM, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), ESTELLE v. GAMBLE, supra, and WESTER v. JONES, 554 F.2d 1285 (4th Cir. 1977), West's complaint fails to state a cognizable claim for relief under § 1983. As the Fourth Circuit stated in WESTER:

> ...It is undisputed that the doctor examined Wester and found no medical problem. Wester's continued complaints about the same symptoms did not persuade him to change this diagnosis on subsequent occasions. Even if the doctor were negligent in examining Wester and in making an incorrect diagnosis, his failure to exercise sound professional judgment would not constitute deliberate indifference to serious medical needs. Consequently, Wester's own version of the facts do not support his claim for violation of the Eighth Amendment. We therefore conclude that the district court properly

> granted summary judgment in favor of the prison authorities.

West's allegations arising out of his claim that Dr. Atkins

> ... Through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for a badly torn Achilles tendon ...

sets forth, at best, a negligence based claim. Negligence of prison officials is not actionable under § 1983. See DAVIDSON v. CANNON, 474 U.S. ___, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); DANIELS v. WILLIAMS, 474 U.S. ___, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). In these cases, this Court held that a due process deprivation does not arise from a "negligent act of an official causing unintended lost or injury to life, liberty of property." Furthermore, West's allegations do not amount to deliberate indifference to his medical needs. ESTELLE v. GAMBLE, supra. In any event, differences concerning a course of treatment do not amount to a constitutional violation. BOWRING v. GOODWIN, 551 F.2d 44, 48 (4th Cir. 1977).

CONCLUSION

In BAKER v. McCOLLAM, supra, the Court held that § 1983 does not impose liability for violations of duties of care arising out of tort law and the remedy for that type of injury must be sought in state court under traditional tort law principles. This Court noted, citing ESTELLE v. GAMBLE, supra, that just as medical malpractice does not become a violation of the federal constitution's prohibition of cruel and unusual punishment merely because the victim is a prisoner, false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official. This Court's reasoning in BAKER v. McCOLLAM, supra, was expanded in PARRATT v. TAYLOR, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), in which this Court stated that:

> ...to accept the respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting "under color of state law" into a violation of the Fourteenth Amendment

> cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who was involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning would "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." PAUL v. DAVIS, 424 U.S. 693, 701, 47 L.Ed.2d 405, 96 S.Ct. 1155. We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT ATKINS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

No. 87-5096

QUINCY WEST,

Petitioner,

v.

SAMUEL ATKINS,

Respondent

CERTIFICATE OF SERVICE

I, Jacob L. Safron, a member of the bar of this Court, hereby certify that on the 25 day of September, 1987, a copy of the Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals in the above captioned case was mailed, first class postage prepaid, to Richard E. Giroux, Esq., Attorney for Petitioner, 112 South Blount Street, Raleigh, North Carolina 27601. I further certify that all parties required to be served have been served.

Jacob L. Safron
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No. 87-5096

IN THE

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SAMUEL ATKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 8, 1987
CERTIORARI GRANTED OCTOBER 19, 1987

TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Nov. 29, 1984	— Pro se Complaint filed.
Dec. 13, 1984	— Order of Partial Dismissal—dismissed as to McNamara and Gov. Hunt. Claims against Atkins are not frivolous and plaintiff may proceed against him.
March 7, 1985	— Issued Summons and Complaint.
April 22, 1985	— Motion for Summary Judgment and to Dismiss with Supporting Memorandum of Law, by defendants. Two affidavits to be forwarded.
May 6, 1985	— Affidavit of Samuel Atkins filed. Affidavit of Frank J. Nuzum filed.
May 31, 1985	— Quincy West's pro se response to defendant's Motion for Summary Judgment and to Dismiss.
June 7, 1985	— Order entered allowing Samuel Atkins' Motion for Summary Judgment.
	— Judgment filed. McNamara and Hunt having already been dismissed, action is now closed.
June 17, 1985	— Notice of Appeal filed by Quincy West.
Sept. 23, 1985	— N.C. Prisoner Legal Services files Motion for Leave to File a Brief of an Amicus Curiae on behalf of Quincy West.
Nov. 18, 1985	— Order filed assigning Richard E. Giroux of N.C. Prisoner Legal Services to represent Quincy West in his appeal to the Fourth Circuit Court of Appeals.
Sept. 3, 1986	— Panel Opinion and Judgment of the Fourth Circuit Court of Appeals.

DATE	PROCEEDINGS
Sept. 15, 1986	— Petition for Rehearing and Suggestion That Case Be Heard En Banc.
Nov. 12, 1986	— Order filed vacating panel opinion and ordering rehearing en banc.
Dec. 5, 1986	— Order filed granting Motion for Leave to File Brief of Amicus Curiae.
April 9, 1987	— En Banc Opinion and Judgment of the Fourth Circuit Court of Appeals.

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C., SEC. 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 84-1346 CRT

QUINCY WEST

Prison Number 20846-26

versus

DR. SAMMUEL ADKINS,
MRS. RAE MCNAMARA,
GOV. JAMES B. HUNT

[Filed Nov. 29, 1984]

I. HAVE YOU BEGUN OTHER LAWSUITS IN FEDERAL COURT DEALING WITH THE SAME FACTS INVOLVED IN THIS ACTION?
Yes ( ) No (x)

II. PLACE OF PRESENT CONFINEMENT Caledonia Correctional Facility
P.O. Box 137, Tillery, N.C. 27887

III. PARTIES

(In Item "A" below place your name in the first blank and your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff Quincy West
Address P.O. Box 137, Tillery, N.C. 27887

(In Item "B" below place the full name of the defendant in the first blank, his official position in

the second blank, and his place of employment in the third blank. Use Item "C" for the name, position, and place of employment for any additional defendants.)

B. Defendant Adkins is employed as an Orthopedic-Surgeon at Central Prison Hospital

C. Additional Defendants Rae McNamara, Dir. N.C. Dept. of Correction, 831 W. Morgan St., Raleigh, N.C. 27606
Gov. James Hunt

IV. STATEMENT OF THE CLAIM

(State here as briefly as possible the FACTS of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. DO NOT GIVE ANY LEGAL CITATIONS OR ANY LEGAL ARGUMENTS OR CITE ANY STATUTES. If you wish to allege a number of related claims, number, and set forth each claim in a SEPARATE paragraph. Use as much space as you need. Attach extra pages if necessary.)

That Defendant Adkins through his negligence and deliberate indifference to Plaintiff's medical needs has denied Plaintiff proper and reasonable medical treatment for a badly torn achilles tendon. As a result of Defendant Adkins negligent treatment Plaintiff West has been subjected to intense and agonizing pain and permanent Injury. That Dr. Adkins improper treatment and his Deliberate indifference to Plaintiff West medical needs has repeatedly been brought to the attention of Defendants McNamara and Hunt.

(1) That on July 30, 1983, while playing volleyball at odom prison, at Jackson N.C. plaintiff West suffered a torn achilles tendon on his left leg above his heel string. Shortly thereafter plaintiff were transported to Woodland, N.C. and examined by a Dr. Stanley who were under contract with

the odom prison unit. Dr. Stanley's examination confirmed that plaintiff injury were a torn achilles tendon. Dr. Stanley directed that plaintiff be transferred to central prison.

(2) That on August 9, 1983, plaintiff West were transferred to central prison where he were examined by defendant Samuel Adkins, an orthopedic surgeon that plaintiff were in great pain and using crutches.

(3) Defendant Adkins after examining plaintiff stated that he should schedule plaintiff for surgery but that he want to experiment with plaintiff injury and see if the torn tendon would grow back together on its own. Defendant Adkins placed a cast on plaintiff leg.

(4) That defendant Adkins maintained a hostile attitude toward plaintiff West and refused to prescribe at plaintiff urgent request the necessary pain killer for relief, and plaintiff were returned to odom prison.

(5) That as a result of defendant Adkins denying plaintiff pain medication, plaintiff West were forced to consume dangerous dosage of asprin and plaintiff purchased various pain medication from other inmates.

(6) That in August 1983, plaintiff cast disintegrated and plaintiff were returned to central prison where defendant Adkins placed a heavier cast on plaintiff leg. Plaintiff again renewed his request for some pain medication but were denied such medication and were returned to odom prison.

(7) That in September 1983, defendant Adkins removed the cast from plaintiff leg and stated that the tendon in plaintiff leg should grow back together, and plaintiff again were denied medication for pain. Plaintiff leg were still badly swollen and hurting.

(8) That in late September 1983 plaintiff West while in segregation went on a hungry strike in

protest of administrative brutality and the lack of any medication for pain. Shortly afterward the unit physician Dr. Stanley gave plaintiff some motrin pills which failed to reduce the pain in plaintiff leg and achilles tendon.

(9) That on October 14, 1983 the Director's Subcommittee Recommended that plaintiff be demoted in custody and placed on intensive management. Plaintiff West immediately went on another hungry strike and on *November 8, 1983* plaintiff West were transferred to lock-up at central prison at Raleigh, N.C.

(10) That upon arriving at Central Prison and being searched plaintiff's motrin pills and ornade pills for his sinus were taken from him and given to the nurse at the nurse station. After plaintiff protested the nurse explained that it were a prison policy that such medication entering central be seized and that plaintiff would be scheduled to see the doctor so the medication could be re-prescribed by the Unit Doctor.

(11) That on November 10, 1983 plaintiff West wrote a letter to Warden Nathan Rice seeking his help in obtaining medication for both pain and sinus.

(12) That on November 11, 1983 plaintiff West wrote a letter to defendant Adkins pleading for defendant to see plaintiff due to excessive swelling and pain also plaintiff discussed his painful injury with the nurses in the cellblock each morning.

(13) That on or about November 15, 1983 Mr. Core, a central prison psychiatrist saw plaintiff swollen leg and promised to contact defendant Adkins and have plaintiff re-examined and given some medication or hospilized. However, plaintiff did not hear from defendant Adkins.

(14) That on December 5, 1983, a nurse informed plaintiff that he were scheduled to see defendant Adkins on December 7, 1983. Plaintiff

cannot recall if defendant Adkins in fact saw him on December 7th.

(15) That on January 10, 1984, plaintiff were carried to the orthopedic clinic where defendant Adkins examined his injury. After a five minute examination defendant Adkins stated that the tear in plaintiff leg had not closed up and that defendant wanted to see plaintiff again in one month. Plaintiff West told defendant Adkins that he could not walk and plaintiff again asked for some pain medication. Defendant Adkins stated that plaintiff should be able to handle the pain for a while because the injury would soon be closed up. Defendant Adkins upon plaintiff request wrote a prescription for plaintiff to be issued high top tennis shoes. . . . However no such shocs were given to plaintiff.

(16) That on January 11, 1984, plaintiff West wrote letters to defendant McNamara and Hunt asking that they intervene in the withholding of proper and adequate medical treatment for plaintiff by defendant Adkins.
Plaintiff also reminded defendants McNamara and Hunt that defendant Adkins had a bad reputation among the inmate class for his primitive form of surgery and the denial of adequate treatment.

(17) That defendant McNamara on two occasions returned plaintiff letters to central prison, where a lieutenant would come by plaintiff cell and ask a few questions and plaintiff never heard anything else.

(18) That on or about February 15, 1984, plaintiff West were carried to the orthopedic clinic and examined by defendant Adkins. Plaintiff achilles tendon were still swollen and sore. Defendant Adkins felt the achilles tendon area briefly and written something in the plaintiff medical jacket. Defendant Adkins then told plaintiff that

the tendon had not closed up. Plaintiff stated the hole in his leg had not closed any and that plaintiff leg were getting worser instead of better. At that point defendant Adkins got up and demostrated how plaintiff should learn to walk. . . .

However plaintiff could not possibly walk as instructed due to the stiffness, soreness, and swelling in his leg.

(19) That plaintiff further told defendant Adkins that he had not even received the high top tennis shoes to protect his achilles tendon which defendant Adkins had prescribed for plaintiff a month earlier on January 10, 1984. Before leaving *defendant Adkins said that he would see plaintiff on a regular basis . . . and that he may have to perform surgery and pull the tendon together.*

(20) That plaintiff leg continued to swell even larger and he suffered constant pain. Each time plaintiff sought some pain medication the (PA) physician assistant would schedule plaintiff to see defendant Adkins but Adkins never again met with plaintiff again.

(21) That on or about March 28, 1984 plaintiff showed nurse Earp his badly swollen leg. Nurse Earp stated that plaintiff needed to see defendant Adkins and plaintiff again signed up for the orthopedic clinic. Plaintiff stated that defendant Adkins on February 15, 1984 had promised to see plaintiff periodically. Nurse Earp promised to review plaintiff's medical record.

(22) That on March 29, 1984, Nurse Earp stated that he had looked at plaintiff's medical record and that defendant Adkins had wrote therein that he had released plaintiff from his care and that *defendant Adkins would not be seeing plaintiff anymore*, afterward Nurse Earp measured plaintiff's foot for a stocking which supposedly would releive the swelling in plaintiff achilles tendon, ankle, and his leg.

(23) That the stocking failed to alleviate any noticeable swelling in plaintiff's leg, and plaintiff once again wrote letters to defendant McNamara, defendant Hunt, and to the American Civil Liberties Union compalining of the lack of medical treatment.

(24) That in March 1984, plaintiff wrote a letter to one Dr. Eppley, another orthopedic Doctor at the central prison hospital. Plaintiff explained his injury and the experiences with defendant Adkins, and asked Dr. Eppley to examine plaintiff at his convenience. Dr. Eppley did not reply and a nurse told plaintiff that the letter probably were referred to defendant Adkins.

(25) That in March 1984, Plaintiff wrote a letter to Capt. Curry and asked to see him. Afterward plaintiff met with Capt. Curry and asked for assistance in getting some treatment for his injury. Capt. Curry also promised to help plaintiff stay at central prison after being removed from Intensive Management, in order that plaintiff, would be closer to the central prison medical facilities.

(26) That on June 1, 1984, plaintiff filed an administrative grievance against defendant Adkins. . . . . and alleged as follows;

> Dr. Adkins were treating me for a torn (achilles tendon) heel string. He has not saw me since 2/14/84. My heel string has not grown back. I suffer constant pain, and Dr. Adkins has not saw me since in spite of the Nurse, Mr. Earp referring me to Dr. Adkins and several letters.

On June 18, 1984, the Grievance after being processed were brought to the plaintiff to sign. The Grievance stated as follows: quote;

> Inmate is scheduled to see Dr. Adkins on 6-21-84. No further action recommended.

(27) That 6-21-84 came and passed without plaintiff West seeing Dr. Adkins. Plaintiff immediately wrote a letter to defendant McNamara asking that she investigate defendant Adkins and the central prison medical facilities.

(28) That on or about June 28, 1984, plaintiff West were abruptly transferred from central prison to the Intensive Management facility at Caledonia prison.

(29) That on July 3, 1984, plaintiff West accidentally took an overdose of aspirins in an effort to curb the pain in his leg and achilles tendon. Thereafter plaintiff signed up to see the P.A. in the medical center. Shortly afterward the unit P.A. placed plaintiff on mortrin for pain which fails to give plaintiff much relief from the pain.

(30) That on October 25, 1984, plaintiff's foot and leg swollen up even larger and the unit Doctor confined plaintiff to bed for a week. The following night on October 26, 1984, at 1:30 a.m. plaintiff West were again carried to the nurse station where the nurse called the Doctor at his home.

(31) That plaintiff foot and leg has been swollen and painful continuously since his injury and at no time since has plaintiff's progressed medically.

Plaintiff has a terrible limp in his walk. Plaintiff is unable to run, jump, sqwat and his entire foot and leg now has poor blood circulation. Plaintiff's injury in the absence of proper medical treatment has caused plaintiff leg to partially whither and weaken. All of which has cause plaintiff West to suffer great pain and mental anguish in violation of his constitutional rights.

That defendant Hunt and McNamara by their lapses and lack of sensitivity to inmate medical care has contributed equally to defendant Adkins

Lapses in causing plaintiff West to suffer a grievous irreparable loss.

V. RELIEF SOUGHT BY INMATE

(State briefly exactly what you want the Court to do for you. MAKE NO LEGAL ARGUMENTS. DO NOT CITE CASES OR STATUTES.)

(1) A declaratory judgement that Plaintiff is entitled to proper medical treatment. (2) That Plaintiff has been denied proper medical treatment. (3) An order directing the N.C. Dept. of Correction to have Plaintiff treated and examined by an Orthopedic Surgeon other than Defendant Adkins. (4) That the court appoint a party to examine Plaintiff's leg for trial evidence. (5) $1,000,000.00 in compensatory damages and $500,000.00 in punitive damages from Defendant Adkins. $640,000.00 in compensatory damages and $360,000.00 in punitive damages from Defendant McNamara, and a declaratory judgement again Gov. Hunt. Trial by jury requested.

Signed this 23 day of November, 1984

/s/ Quincy West
(Signature of Plaintiff)
(Signature of other
Plaintiffs, if necessary)

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Quincy West
(Signature of Plaintiff)
(Signature of other
Plaintiffs, if necessary)

11/23/84
(Date)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

ORDER OF PARTIAL DISMISSAL

This action comes on to be heard before the undersigned United States District Judge for a determination of frivolity under 28 U.S.C. Sec. 1915(d). The court finds, after carefully considering the plaintiff's complaint, that the claims against defendants Hunt and McNamara are frivolous because the plaintiff has failed to allege the personal involvement of those defendants in the deprivation of his Constitutional rights. Accordingly, the claims against those defendants are DISMISSED.

The claims against defendant Adkins are not frivolous, and the plaintiff may proceed against him.

SO ORDERED this 10th day of December, 1984.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

**MOTIONS TO DISMISS
AND FOR SUMMARY JUDGMENT**

Filed April 22, 1985

TO: THE HONORABLE, THE JUDGE OF SAID COURT:

NOW COMES the Defendant, Dr. Samuel Atkins, Orthopedic Physician employed under contract at North Carolina Central Prison Hospital, Raleigh, North Carolina, by Lacy H. Thornburg, Attorney General of North Carolina, and Jacob L. Safron, Special Deputy Attorney General, his attorneys, who move the Court, pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the paperwriting filed herein and as reasons therefor respectfully show unto the Court:

1. That, this Honorable Court lacks jurisdiction over the subject matter of the paperwriting.

2. That, this Honorable Court lacks jurisdiction over the Defendant.

3. That, the contentions set forth in the paperwriting fail to state a claim upon which the relief sought can be granted.

4. That, the contentions set forth in the paperwriting are conclusory in nature and fail to adequately allege facts in support thereof.

5. That, the paperwriting is totally absent of any allegations concerning in what manner the Defendant has allegedly violated the Plaintiff's constitutional rights.

6. That the contentions set forth in the Plaintiff's paperwriting are captious, frivolous and utterly without merit.

MOTION FOR SUMMARY JUDGMENT

The Defendant moves the Court, in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, to enter Summary Judgment in his favor; this Motion being made upon the grounds that the Plaintiff's paperwriting and other matters of record set forth and attached to the Memorandum of Law submitted by the Defendant reveal that he is entitled to Summary Judgment as a matter of law.

The Defendant alleges in support of his Motion for Summary Judgment:

1. That, the Defendant adopts and again alleges the matters and things previously alleged and set forth above as a part of this Motion.

2. That, there are no genuine issues of material facts existing which are determinative of any right or duty which the Defendant owes the Plaintiff and, as a matter of law, the Defendant is entitled to summary judgment.

3. That, there are no genuine, relevant or material facts as to the deprivation of any constitutional rights of the Plaintiff and, therefore, no cause of action exists in his favor.

4. That, this action be dismissed and that any Motion to Dismiss be granted for any other lawful reason or ground that may pertain to this action.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

/s/ Jacob L. Safron
JACOB L. SAFRON
Special Deputy
Attorney General
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7188

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

DEFENDANT ATKINS' MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Filed April 22, 1985

Quincy West, an inmate in the custody of the North Carolina Department of Correction, brings this action against Dr. Samuel Atkins pursuant to 42 U.S.C. § 1983 for the violation of West's Eighth Amendment rights by Dr. Atkins' alleged failure to provide West with adequate medical treatment. West alleges that he suffered a torn achilles tendon on his left leg above his heel string while playing volleyball on July 30, 1983 at the Odom Correctional Center at Jackson, North Carolina, and that Dr. Samuel Atkins, an orthopedic physician on contract at North Carolina Central Prison Hospital at Raleigh

> . . . through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for a badly torn achilles tendon. . . .

This case is identical to CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984). Charles Edward Calvert, an inmate at the Maryland penitentiary, sued Dr. Nathaniel Sharp, also a private physician, pursuant to § 1983 for the violation of his Eighth Amendment rights. Dr. Sharp moved to dismiss the Complaint for lack of subject matter jurisdiction on the ground that he did not act under

color of state law. The trial court denied the motion. The Fourth Circuit disagreed and reversed, holding that Dr. Sharp neither acted under color of state law nor did he perform a "public function." "Dr. Sharp's specific function was diagnosis and treatment of orthopedic problems. This is clearly not within the *exclusive* prerogative of the state."

On April 2, 1985 the Fourth Circuit Court of Appeals also filed an opinion in CANNON v. BEANE, —— F.2d —— (4th Cir., April 2, 1985) (No. 85-6035) [Unpublished], a copy of which is attached. Cannon, a Virginia inmate, filed a § 1983 action against Dr. James W. Beane, a Richmond dentist, contending that Beane did not conduct himself in a professional manner and caused an infection in Cannon's throat. Cannon complained that Beane was nonprofessional and negligent by failing to wash his hands between his examination of an inmate with a gum infection and his examination of Cannon. As a result of Beane's failure to wash his hands, Cannon contended, he developed a persistent sore throat which required subsequent medical attention. In affirming the District Court's dismissal of Cannon's action for failure to allege that Dr. Beane was acting under color of state law, the Fourth Circuit stated that:

> As a jurisdictional requisite to maintain a 42 U.S.C. § 1983 action, Cannon must establish that Beane acted under color of state law. *See* POLK COUNTY v. DODSON, 454 U.S. 312 (1981). Beane, a private dentist, is not dependent upon the state for funds nor engaged in a public function. Beane was not granted by the state custodial or supervisory duties over the inmates. *See* CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984); HALL v. QUILLEN, 631 F.2d 1154 (4th Cir. 1980).
>
> We conclude that Beane was not acting under the color of the state and we affirm the United States Magistrate's dismissal of Cannon's action for failure to state a claim cognizable under § 1983.

Like Dr. Sharp, Dr. Atkins had no custodial or supervisory duties. As Dr. Atkins testifies in his Affidavit, a copy of which is submitted herewith and made a part hereof:

> . . . I contracted with the North Carolina Department of Correction, Division of Prisons, to provide health care services for the Central Prison Hospital in Raleigh, North Carolina. According to my contract, my services began on September 1, 1981. Up until my termination effective March 20, 1985, I acted as an orthopedic physician for the Central Prison Hospital as provided in this contract. A copy of my contract with the North Carolina Department of Correction is attached to this Affidavit . . . When I served as the physician providing medical services for inmates at Central Prison Hospital I had no custodial or supervisory duties in relation to the inmates. I exercised my own judgment. I made my own medical decisions according to standards established by the American Medical Association, and not those established by the North Carolina Department of Correction.

Dr. Frank J. Nuzum, Director of Health Services for the Department of Correction testifies in his Affidavit, a copy of which is submitted herewith and made a part hereof, that:

> The Department of Correction has contracted with many medical services providers . . . All of these independent contractors have clauses in their contracts which provide for termination, by either party, upon a thirty day notice. These persons are *not* state employees and, thus, do not receive any of the benefits provided state employees such as retirement pensions, worker's compensation, Personnel Act rights, insurance, and the like. There are no Social Security funds nor state and federal taxes withheld from the checks paid to these persons for their services.

It is true that these medical services providers are under the authority of the respective warden or Unit Superintendent, but only administratively, as he is in command of the prison unit. The only order that the Superintendent might give one of these contractual medical services providers is to examine an inmate who has complained of a medical problem to the custodial staff. The Superintendent has no authority to exercise any medical judgment or to delegate any medical or clinical decisions. The medical services providers exercise their independent medical judgment and make their own medical clinical decisions, with no interference by custodial personnel.

* * * *

The contractual medical services providers are subject to regulations of the North Carolina Board of Medical Examiners, the North Carolina Medical Association, the North Carolina Board of Nursing and other similar medical associations. . . .

> None of the contractual physicians . . . have any custodial duties and each exercises his own independent medical judgment according to the standards of the medical profession to which he belongs, and not according to direction or regulation from any correctional personnel.
>
> Dr. Samuel Atkins . . . was under contract to provide orthopedic health care services to those inmates housed at Central Prison Hospital from September 1, 1981, until his contract was terminated on March 20, 1985. Dr. Atkins was an independent contractor and did not provide any custodial or supervisory services. He exercised his own independent medical judgment when providing medical services to inmates. . . . A copy of Dr. Atkins' contract with the Department of Correction is attached. . . .

In light of CALVERT v. SHARP, *supra*, there is a lack of subject matter jurisdiction which requires dismissal of Plaintiff's Complaint. In any event, even if this Court had jurisdiction over Dr. Atkins, which it does not, under BAKER v. McCOLLAM, 443 U.S. 137, 99 S.C. 2689, 61 L.Ed.2d 433 (1979), ESTELLE v. GAMBLE, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) and WESTER v. JONES, 554 F.2d 1285 (4th Cir. 1977), the Plaintiff's Complaint fails to state a cognizable claim for relief under § 1983.

For the foregoing reasons, Dr. Samuel Atkins moves the Court to grant this Motion and dismiss the Plaintiff's action for lack of subject matter jurisdiction.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

/s/ Jacob L. Safron
JACOB L. SAFRON
Special Deputy Attorney General
Attorneys for Defendant

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6035

ODELL CANNON, JR.,
Appellant,

versus

DR. JAMES W. BEANE,
Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond
David G. Lowe, United States Magistrate—
(C/A No. 84-0508-R)

Submitted: February 27, 1985 Decided: April 2, 1985

Before ERVIN, CHAPMAN and WILKINSON, Circuit Judges.

PER CURIAM:

Odell Cannon, Jr., a Virginia inmate, filed this 42 U.S.C. § 1983 action against Dr. James W. Beane, a Richmond dentist, contending that Beane did not conduct himself in a professional manner and caused an infection in Cannon's throat. While in Henrico County Jail, Can-

non and two other inmates were taken to Beane for Emergency dental treatment. Pursuant to an oral agreement with the County of Henrico, Virginia, Beane routinely provides emergency dental services for persons incarcerated in the Henrico County Jail. Cannon complains that Beane was nonprofessional and negligent, by failing to wash his hands between his examination of an inmate with a gum infection and his examination of Cannon. As a result of Beane's failure to wash his hands, Cannon contends, he developed a persistent sore throat which required subsequent medical attention. The United States Magistrate dismissed Cannon's action for failure to allege that Dr. Beane was acting under color of state law.

As a jurisdictional requisite to maintain a 42 U.S.C. § 1983 action, Cannon must establish that Beane acted under the color of state law. *See Polk County v. Dodson*, 454 U.S. 312 (1981). Beane, a private dentist, is not dependent upon the state for funds nor engaged in a public function. Beane was not granted by the state custodial or supervisory duties over the inmates. *See Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984); *Hall v. Quillen*, 631 F.2d 1154 (4th Cir. 1980).

We conclude that Beane was not acting under the color of the state and we affirm the United States Magistrate's dismissal of Cannon's action for failure to state a claim cognizable under § 1983.

As the dispositive issues have been decided authoritatively, we dispense with oral argument. The decision of the United States Magistrate is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

AFFIDAVIT

Filed May 6, 1985

I, SAMUEL ATKINS, M.D., being first duly sworn, do hereby depose and say:

That I contracted with the North Carolina Department of Correction, Division of Prisons, to provide health care services for the Central Prison Hospital in Raleigh, North Carolina. According to the contract, my services began on September 1, 1981. Up until my termination effective March 20, 1985, I acted as an orthopedic physician for the Central Prison Hospital as provided in this contract. A copy of my contract with the North Carolina Department of Correction is attached to this affidavit and incorporated by reference as Exhibit A. When I served as the physician providing medical services for inmates at the Central Prison Hospital I had no custodial or supervisory duties in relation to the inmates. I exercised my own judgment. I made my own medical decisions according to standards established by the American Medical Association, and not those established by the North Carolina Department of Correction.

This the 26 day of April, 1985.

/s/ S. W. Atkins
Affiant

Sworn to and subscribed before me this the 26 day of April, 1985.

/s/ Vickie S. Jacobs
Notary Public

My Commission Expires:
7/12/89

EXHIBIT A

STATE OF NORTH CAROLINA
DEPARTMENT OF CORRECTION

840 West Morgan Street
Raleigh 27603

CONTRACT FOR PROFESSIONAL SERVICES

This contract is hereby executed between the Division of Prisons, party of the first part, and Samuel W. Atkins, M.D., party of the second part, a Orthopedic Service, licensed by the State of North Carolina. The purpose of this contract is to acquire competent services in the discipline set forth above for all inmates assigned to Central Prison Hospital 3100.

WITNESSETH:

That for the purpose and subject to the terms and conditions hereinafter set forth, the Division of Prisons hereby employs said party of the second part; and said party of the second part accepts such employment;

The purpose, terms and conditions of this contract are as follows:

FIRST: The duties to be performed by the party of the second part are as follows:

To provide two Orthopedic Clinics per week. To see all orthopedic and neurological referrals. To perform orthopedic surgery as scheduled. To conduct ward rounds on post operative patients and on all patients assigned to the orthopedic service as often as necessary to insure patient's progress towards recovery.

To coordinate with the Physical Therapy Department and to order that therapy necessary to restore function.

To request the assistance of neurosurgical consultants on all spinal surgical cases. To provide on-call

orthopedic services 24 hours per day for emergency orthopedic evaluations or surgery.

To furnish 2 (days) of professional service per week in fulfillment of the duties above described.

SECOND: This employment shall begin on the 1st day of September, 1981, and unless sooner terminated by mutual consent or as hereinafter provided, shall exist and continue for five (5) years from date; provided that either party shall have the right to terminate this contract for employment upon thirty (30) days notice in writing to the other party, and further provided that the party of the first part may cause immediate termination of this contract due to lack of funds.

THIRD: As full compensation for services, the party of the second part is to receive from the party of the first part the sum of $495.00 dollars per clinic (payable upon receipt and approval of an invoice, DC-105. To use the 1964 Relative Value Schedule with a 12.0 conversion factor for surgical procedures.

IN TESTIMONY WHEREOF said parties have executed this contract; a copy to be delivered to each of the parties after final approval. The Director, Division of Prisons, is responsible for contract administration; and the Assistant Secretary for Management and Productivity is responsible for approval of invoices.

PARTY OF THE FIRST PART:

Division of Prisons
Rae McNamara, Director

By: /s/ S. P. Gowan
(Approved Authority)
Date 10/16/81

PARTY OF THE SECOND PART:

/s/ Samuel W. Atkins, M.D.
Date 10/15/81
242-24-1287)
(Social Security Number

APPROVED:

By: /s/ (Illegible)
(Section Manager)
Date 10/21/81
Assistant Secretary for
Management and Productivity

By: /s/ O. L. Gabriel
(Approved Authority)
Date 11-2-81

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

AFFIDAVIT

Filed May 6, 1985

I, FRANK J. NUZUM, PhD, being first duly sworn, do hereby depose and say:

That I am employed by the North Carolina Department of Correction, Division of Prisons, as Director of Health Services. I am a Health Care Administrator with almost twenty years experience in the field of Health Care Planning and Services. My responsibilities include the recruitment of Health Care personnel, both contractual and permanent employees, for the Division of Prisons.

The Department of Correction has contracted with many medical services providers, including physicians, physician's assistants and nurses, who provide medical services to inmates. All of these independent contractors have clauses in their contracts which provide for termination, by either party, upon a thirty day notice. These persons are *not* state employees and, thus, do not receive any of the benefits provided state employees such as retirement pensions, worker's compensation, Personnel Act rights, insurance, and the like. There are no Social Security funds nor state and federal taxes withheld from the checks paid to these persons for their services.

It is true that these medical services providers are under the authority of the respective warden or Unit Super-

intendent, but only administratively, as he is in command of the prison unit. The only order that the Superintendent might give one of these contractual medical services providers is to examine an inmate who has complained of a medical problem to the custodial staff. The Superintendent has no authority to exercise any medical judgment or to delegate any medical or clinical decisions. The medical services providers exercise their independent medical judgment and make their own medical clinical decisions, with no interference by custodial personnel.

The only "regulations" as such to which these contractual medical services providers are subject are "standing orders" and "protocols" outlined in the Departmental Health Care Manual. These standing orders are approved by the Unit Physician and provide for immediate medical treatment in certain instances so that a physician's assistant or unit nurse may commence medical treatment without necessarily contacting the Unit Physician. For example, if an inmate reported to sick call with Urticaria (hives), the standing order is to give the inmate "Benadryl (Diphenhydramine HCL) 50 mg po stat and Benadryl (Diphenhydramine HCL) 25 mg po tid until seen by physician extender or M.D.". There are a series of these standing orders and protocols provided in the Health Care Manual. However, custodial personnel have no authority to alter these treatments. That discretion lies wholly within the authority of the medical services providers.

The contractual medical services providers are subject to regulations of the North Carolina Board of Medical Examiners, the North Carolina Medical Association, the North Carolina Board of Nursing and other similar medical associations. Contractual nurses are subject to orders from unit physicians and physician's assistants. Likewise, contractual physician's assistants are subject to orders from the unit physicians.

None of the contractual physicians, physician's assistants, or nurses have any custodial duties and each exercises his own independent medical judgment according to standards of the medical profession to which he belongs, and not according to direction or regulation from any correctional personnel.

Dr. Samuel Atkins, who is named as a defendant in the above-captioned civil action, was under contract to provide orthopedic health care services to those inmates housed at Central Prison Hospital from September 1, 1981, until his contract was terminated on March 20, 1985. Dr. Atkins was an independent contractor and did not provide any custodial or supervisory services. He exercised his own independent medical judgment when providing medical services to inmates. The only possible order or direction the Warden might have given him would have been to order him to examine an inmate who had complained to custodial staff about a medical problem. The Warden, Nathan Rice, had no authority to direct Dr. Atkins in medical or clinical decisions. A copy of Dr. Atkin's contract with the Department of Correction is attached to this affidavit and incorporated by reference as Exhibit A.

This the 17th day of April, 1985.

/s/ Frank J. Nuzum
Affiant

Sworn to and subscribed before me this
the 17th day of April, 1985.

Nancy S. Wall
Notary Public

My Commission Expires:
May 24, 1988

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH, N.C.

(Title Omitted in Printing)

TRAVERSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, AND PLAINTIFF MEMORANDUM OF LEGAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, AND THAT DEFENDANT'S MOTION BE DISMISSED AS SHAM

Filed May 31, 1985

TO: The Honorable(s) Judge or Magistrate Presiding over the District Court of the United States for the Eastern District of North Carolina ..... at Raleigh, Greetings;

Now respectfully comes the pro se plaintiff, Quincy West, and move this Honorable Court to dismiss the paper writing of the defendant, and to accept jurisdiction in the case under those statutes together establishing original federal Court jurisdiction in state Civil Rights Cases.

The plaintiff disputes defendant's contention that this federal Court donot have jurisdiction. The plaintiff shows herein that this federal Court is the only Court that has jurisdiction to hear this case as shown more fully herein.

Jurisdiction (federal) is Proper

Clearly the ultimate issue in determining if a person is subjected to suit under section 1983 is whether the allege infringement of federal rights is fairly attributable to the state, 42 U.S.C.A. 1983. See: *Rendell-Baker v.*

Kohn, 457 U.S. 830, 838, 102 S. Ct. 2764, 2770, 73 L. Ed. 2d 418 (1982) and here the facts are cut and dry that the defendants action were carried out under color of state law, and this is a fact-bond inquiry issue. *Lugar v. Edmondson Oil Co.* 457 U.S. 922, 939, 102 S. Ct. 2744, 2755, 73 L. Ed. 2d 482 (1982).

Defendant Adkins signed a valid contract with the state of North Carolina to provide Orthopedic care for inmates in the North Carolina Dept. of Correction. His contract were signed and approved by Mrs. Rae McNamara, former state prison Director, who this Court released as a co-defendant of defendant Adkins on Dec. 10, 1984. Defendant Adkins signed the same type of contract as all prison employees and Adkins is surely as much an employee under color of state law when treating prisoners as any other prison employee who signed contracts to perform service. Adkins signed a contract to perform medical services while others agreed to perform services in the areas of custody, food service, prison enterprise, etc. The fact that defendant Adkins contend that he has another private Job is inmaterial to the fact that on the Job at Central Prison, if only for a moment, that defendant Adkins is acting under color of state law by virtue of the nature of his contract. And since the defendant has raised a 12(B)(1) Motion to Dismiss, plaintiff ask this Court to examine closely *defendant's Contract* and other evidence submitted in the record in determining whether suvject matter Jurisdiction donot or do exist. It is proper for this Court to make a distinction between defendant's contract even from other evidence handed down by the fourth Circuit Court of Appeals. *Adams v. Bain*, 697 f. 2d. 1213, 1219 (4th Cir. 1982).

The defendant obviously felt that he were acting under color of state law when he negligently subjected plaintiff to permanent injury because plaintiff notices that the N.C. Attorney General's office is defending Dr. Adkins. Adkins and his counsel has approached this case as if

jurisdiction were the only issue lost on them is the serious injuries which defendant Adkins has caused plaintiff to suffer.

> Defendant Adkins donot even attempt to deny the allegations against him, but seek to delay Justice by contesting the Jurisdiction of this Court

Surely the defendant should not be rewarded by such a mockery as a matter of law. Normally when there is a *factual question* common to the *merit* as well as to Jurisdiction, a resulting dismissal should be on the merits and not evasive tactics. *Bell v. Hood,* 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed 939 (1946)

> Defendant evidence and precedent Memorandum are misleading and false.

plaintiff West says that his case against Dr. Adkins is not like the case of *Calvert v. Sharp,* 748 f. 2d 861 (4th Cir. 1984) which the defendant now wraps himself in, nor is plaintiff case compatible in principle or theory to *Polk County* or *cannon* to clarify what the defendant are attempting to do by raising *Calvert v. Sharp,* 748 2d 861 (4th Cir. 1984) the plaintiff will show this Court that the cases which defendant rely on for a dismissal is simply trite and feckless and another reason why this Court should *dismiss the defendant's* Motion and Conduct a hearing on the merits of the case.

The case raised by defendant Adkins is *Calvert v. Sharp,* 748 f. 2d 861 (4th Cir. 1984) the defendant and the fourth Circuit is right. Dr. Sharp did not act under color of state law. *But Dr. Sharp's actions are not even close to those of defendant Adkins.*

(1) Dr. Sharp was not dependant upon the state of Maryland for funds. (2) Dr. Sharp did not draw a monthly check from the department of corrections or from the state, as defendant Adkins did. (3) Dr. Sharp did not sign a contract with the department of Corrections as defendant did, and (4) Dr. Sharp did consider

himself to be employed by the department of Correction even part-time as defendant Adkins did.

Dr. Sharp was physician employed by a *private medical group* known as the (CPPA) Chesapeake Physicians, PA Dr. Sharp was not dependant upon the state for funds because he worked for (CPPA) the Chesapeake Physician medical group and not the state of Maryland. Furthermore, the (CPPA) Chesapeake Physicians PA. itself was not dependant upon the state for funds. This case is hardly the same as the complaint filed against defendant Adkins. Adkins signed a contract with the N.C. dept. of Corrections and drew a salary as a result of that contract and services rendered. Dr. Sharp worked for a third party sub-contractor, and by statute. *Md Code Ann. Art 27 698 (1982)* Maryland has enacted provisions where medical services performed is not within the exclusive prerogative of the state.

Based on these facts one do not need be a Harvard Law School Graduate to distinguish the vast differences between the Activities of Dr. Sharp and *defendant Adkins.* Again these fact disprove defendant contention and support the plaintiff's that *defendant Adkins can be properly sued under color of state Law by virtue of his strange contract for services. Adams v. Bain,* 697 f. 2d. 1213, 1219 (4th Cir. 1982)

> This Court has pendent Jurisdiction to hear Plaintiff's Complaint.

Originally the plaintiff had sued Mrs. Rae McNamara, prison Director, and Gov. James Hunt as co-defendants of defendant Adkins. On Dec. 10, 1984, Judge Boyle dismissed defendants Hunt and McNamara from the Complaint.

Plaintiff West immediately filed an interlocutory appeal to the Fourth Circuit in order to preserve McNamara and Hunt as defendants. On April 13, 1985, the Fourth Circuit informed plaintiff West that the Court would review a final Judgment under 28 U.S.C. 1291 and consider the

dismissal of Hunt and McNamara as defendants at that time. Defendant Adkins is a legitimate subordinate of Mr. McNamara and she had knowledge of defendant Adkins act because plaintiff had wrote her several letters regarding defendant Adkins conduct which made her liable under the Fourth Circuit decision of *Bennett v. Gravell*, 323 f. Supp. 203 (D. Md.) aff'd. 451 f. 2d 1011 (4th Cir. 1971)

Plaintiff filed the interlocutory appeal to continue Mrs. McNamara as a defendant for the purpose of continuing this Courts pendent Jurisdiction to hear this case.

Pendent Jurisdiction as defined by the United States Supreme Court in *Hagans v. Lavine*, 415 U.S. 528, 545-57, 94 S. Ct. 1372 (1974) Allows a federal Court to decide claims alleging violation of the states Common Law. Regulation, Statutes, or Constitution that or not of a federal Constitutional nature, as long as plaintiff have a non-frivolous federal law claim as well arising from the same facts.

Plaintiff now believe that this Court retain pendent Jurisdiction even though Mrs. McNamara was dismissed as a defendant.

Plaintiff belief that this court still retain pendent jurisdiction is on the basis of *Rosado v. Wyman*, 90 S. Ct. 1207, 1212-1214, 397 U.S. 307, 402-402, 25 L. Ed. 2d 442 (1970) where the United States Supreme Court held that a federal Court has discretion to decide a claim within its Pendent Jurisdiction after the claim that give it Jurisdiction has become moot, in that case the Court said that Pendent Jurisdiction is based on "the commonsense policy" of the conservation of Judicial energy and the avoidance of multiplicity of litigation 90 S. Ct. at 1214 397 U.S. at 405.

Cases in which Jurisdiction of pendent claims was retained although the federal claim was dismissed without trial are cited in *13 Wrightmiller and Cooper federal Practice and Procedure, Jurisdiction*: 3567 N-35

CONCLUSION

Plaintiff thinks that this Court has Jurisdiction to hear his claims against defendant Adkins and only pray for *Pendent Jurisdiction* as an alternative.

Their are nothing mysterious nor fancy about this case at all. The plaintiff has sued defendant Adkins for negligence resulting in permanent damages to plaintiff. Defendant donot deny these charges, rather he attempts to escape Justice by contending that the Court donot have the Jurisdiction to determine the case on its merits. Plaintiff donot have any problem understanding why defendant seeks to escape answering the case on the merits . . . . but the facts of Jurisdiction and the merits are against the defendant.

The U.S. Supreme Court has advanced a number of other factors to determine if a private act is done under color of state law. The dependence of the actor on the State for funds, which Adkins surely is. *Rendell-Baker*, 457 U.S. at 840-41 102 S. Ct. at 2771-72 (1982) and the performance by the actor of a Public function. Id. at 842 102 S. Ct. at 2772.

Even more important is the fact that the Fourth Circuit held that a federal Court should also examine the evidence submitted in the record in determining that subject matter Jurisdiction do or don't exist. *Adams v. Bain*, 697 f. 2d 1213, 1219 (4th Cir. 1982). The defendant submitted a copy of his contract as part of his Motion and plaintiff contend that the contract alone will flush out the fact that defendant Adkins acted under color of state law as a matter of fact, in violation of plaintiff constitutional rights pursuant to *Estelle v. Gamble*, —— U.S. ——. 45 USLW 4023 (Nov. 30, 1976). Estelle establishes that the deliberate indifference by a *state* to the serious medical needs of an inmate is a violation of the 8th amendment and can support a 1983 action. Although a plaintiff must establish still that the defendant acted under color of state law. Polk Co. 454 U.S. at 315 162

S. Ct. at 448. Whether the Physician acted under a color of state law was not at issue in Estelle. Because Estelie was a physician who was the medical Director of the Texas dept. of Corrections.

Accordingly, this court have Jurisdiction to hear plaintiff's complaint under 28 U.S.C. 1343(3), 42 U.S.C. 1983, which together establish original federal Jurisdiction under *Monroe v. Pape*, 365 U.S. 167 (1961) with an alternative being a prayer for Pendent Jurisdiction under *Rosado v. Wyman*, Supra. based on the evidence plaintiff has submitted. The plaintiff's expectation of a federal forum is inextricably woven into its doctrine of Judicial Principles and law thereby protected by the first. Eighth, Ninth, and (14th) fourteenth amendments to the federal constitution.

Respectfully Urged

/s/ Quincy West
QUINCY WEST
Caledonia Prison
P.O. Box 137
Tillery, N.C. 27887

CW/cll/3

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

ORDER

Filed June 7, 1985

This prisoner's civil rights action comes before the court on motions to dismiss and for summary judgment of the defendant Dr. Samuel Adkins. Dr. Adkins is an orthopedic physician employed under contract at North Carolina Central Prison Hospital in Raleigh, North Carolina. The basis for the defendant's motions is that this court lacks jurisdiction over the subject matter of the plaintiff's complaint because the defendant did not act under color of state law when he treated the plaintiff. The Fourth Circuit held in *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984) that a private orthopedic specialist employed by a non-profit professional corporation which provided services under contract to the Maryland House of Corrections and the Maryland Penitentiary did not act under color of state law.

The defendant has submitted affidavits which state he is a contract physician and the defendant has a submitted a copy of his contract with the Department of Corrections.

On the basis of the evidence and other filings in this case, the court determines that the defendant Dr. Samuel Adkins is entitled to judgment as a matter of law. The defendant's motion for summary judgment is ALLOWED this 6th day of June, 1985.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

(Title Omitted in Printing)

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (——) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendant Adkins' motion for summary judgment is allowed. Defendants McNamara and Hunt having already been dismissed from this action, this action is now closed.

No costs taxed.

THE ABOVE JUDGMENT WAS FILED AND ENTERED TODAY, JUNE 7, 1985, AND A COPY MAILED TO:

Mr. Quincy West
Caledonia Prison Unit
P.O. Box 137
Tillery, NC 27887

Mr. Jacob L. Safron
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

United States Marshal
Raleigh, NC 27611

J. RICH LEONARD
Clerk

/s/ Lolita K. Pinnex
Deputy Clerk
Raleigh, North Carolina

Date June 7, 1985

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6483

QUINCY WEST,
Appellant,

versus

SAMUEL ATKINS; RAE MCNAMARA; JAMES B. HUNT,
Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh
Terrence W. Boyle, District Judge—(CA 84-1346-CRT).

Argued: April 11, 1986 Decided: September 3, 1986

Before WINTER, Chief Judge, and MURNAGHAN and ERVIN, Circuit Judges.

MURNAGHAN, Circuit Judge:

Presented by a North Carolina prisoner, Quincy West, with a claim under 42 U.S.C. § 1983 that he was deliberately denied adequate medical help by a physician under contract with the state to provide orthopedic care to prisoners, we find it premature to grant summary judgment simply on the grounds that *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 2667 (1985), bars recovery because a private doctor under contract with the state could not be engaged in state action. "The professional obligations and functions of a

private physician establish that such a physician does not act under color of state law when providing medical services to an inmate." *Id.* at 863.

The common law distinction between employee and independent contractor, while not wholly irrelevant, since some of the differences between those two statutes bear on the constitutional issue presented, nevertheless, for common law purposes had different objectives. Whether Dr. Samuel Atkins was or was not a state employee for common law purposes simply does not indisputably settle the question of whether what he did amounted to state action.

To clear the decks and concentrate on the claim against Atkins, we affirm the grant of summary judgment against James B. Hunt, Jr., the then Governor of North Carolina, the doctrine of *respondeat superior* having no application in § 1983 actions. *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977). Rae McNamara, the Director of the prison system, on the other hand, according to the record before us, is shown to have received two complaining letters from West and to have conducted at least a cursory investigation. Any cause of action which may successfully be made out against her, therefore, stands on a basis of liability for her own acts. Consequently, if Atkins might be liable, grounds for requiring her to respond might also exist.

West was injured while playing basketball on July 30, 1983. The Achilles tendon on his left leg was torn. Atkins examined West and concluded that he should schedule surgery, but that he first wanted to see if the tendon would grow back together. Atkins placed West's leg in a series of casts and eventually West received medication for the pain. During September and October 1983 the leg remained swollen and pained West, but prison officials sanctioned West for refusing to work. West has alleged repeated, but frustrated, attempts to have proper attention paid to his torn Achilles tendon. He has allegedly gone without surgery to the present time.

West's action under § 1983 claiming a denial of his right to be free from cruel and unusual punishment followed.

To recover West must overcome two hurdles. He must establish a) that Atkins acted "under the color of state law" and b) that Atkins' course of conduct in attending West's injury showed deliberate indifference to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The second of those two hurdles has not been addressed in the district court, and there should be a remand for decision as to it.

While there may or may not be grounds for distinguishing *Calvert v. Sharp*, we perceive no need to rush to address that potentially troubling issue. Should it be determined, on remand, that the record does not permit a finding of deliberate indifference to a serious medical need, the case will be disposed of adversely to West, without the need for discussing the applicability *vel non* of *Calvert v. Sharp*.

Should the district court determine that there is evidence permitting an inference of deliberate indifference to a serious medical need, it will be time enough for that court, in the first instance, and then, in all probability, for us to address the question of whether action under color of state law could, on the record, be found to exist, bearing in mind that all inferences, on a summary judgment motion, are to be drawn in favor of the party opposed thereto.[1]

Accordingly, the grant of summary judgment in favor of James B. Hunt, Jr. is affirmed. The grants of summary judgment to Atkins and McNamara are vacated, and the case remanded to the district court for disposition in a manner consistent with this opinion.

AFFIRMED IN PART;
REMANDED IN PART.

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[1] *Calvert v. Sharp* was careful to point out the fact-bound nature of the inquiry as to whether the defendant's action has been under color of state law. *Id.* at 862.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6483

(Title Omitted in Printing)

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, there voted in favor of rehearing en banc Judges Russell, Widener, Hall, Sprouse, Chapman, Wilkinson and Wilkins. Those voting against rehearing en banc were Chief Judge Winter and Judges Phillips, Murnaghan and Ervin.

It is accordingly ADJUDGED and ORDERED that the decision and opinion of the panel shall be, and it hereby is, vacated.

It is further ORDERED that the Clerk will place the case on the calendar for oral argument before the en banc court.

/s/ [Illegible]
U.S. Circuit Judge
For the Court

Filed November 12, 1986

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6483

(Title Omitted in Printing)

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh
Terrence W. Boyle, District Judge—(CA 84-1346-CRT).

Argued: December 8, 1986 Decided: April 9, 1987

Before WINTER, Chief Judge RUSSELL, WIDENER, HALL, PHILLIPS, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS Circuit Judges, sitting en banc.

CHAPMAN, Circuit Judge:

In *Calvert v. Sharp*, 748 F.2d 861, 863 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985), we held that "[t]he professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical services to an inmate." Prisoner West brought this § 1983 action against a private physician who was under contract for part-time employment with the state to provide two

orthopedic clinics per week at North Carolina Central Prison Hospital. Because we perceive no valid reason to overrule or distinguish *Calvert*, we affirm the district court's dismissal of the appellant's claim.

I.

West tore the Achilles tendon in his left leg while playing basketball on July 30, 1983. Dr. Atkins examined West and concluded that surgery could be avoided if the tendon would grow back together by itself. Atkins therefore placed West's leg in a cast and prescribed medication. West has alleged that the attention given to his injured leg was so inadequate as to be actionable under 42 U.S.C. § 1983.

North Carolina Central Prison Hospital, where West is imprisoned, has one full-time staff doctor, with additional medical services provided under "contracts for professional services" with area doctors. Dr. Atkins, by contract, conducted two clinics per week at the prison. Atkins also maintained a private practice. It does appear that, because West is a prisoner in "close custody," he is not free to seek outside medical assistance.

West's § 1983 theory alleged a denial of his right to be free from cruel and unusual punishment, as defined by the Eighth Amendment. West sought compensatory and punitive damages from Dr. Atkins, compensatory and punitive damages from Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Corrections, and a declaratory judgment against James B. Hunt, Governor of the State of North Carolina.

II.

The Supreme Court held in *Estelle v. Gamble*, 429 U.S. 97 (1976), that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the Eighth Amendment and can support a § 1983 action. To establish a § 1983 claim, a plaintiff must also show

that the defendant acted under color of state law, an element which was not in issue in *Estelle*. The Supreme Court addressed the requirements for establishing that a defendant, who is a professional, acted under color of state law in the case of *Polk County v. Dodson*, 454 U.S. 312 (1981). *Dodson* held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325 (footnote omitted). Instead, "[h]eld to the same standards of competence and integrity as a private lawyer, . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Id.* at 321. The court noted, moreover, that "[b]ecause of their custodial and supervisory functions, the state-employed doctors in [*O'Connor v. Donaldson*, 422 U.S. 563 (1975)] and *Estelle* faced their employer in a very different posture than does a public defender." *Dodson* at 320. Thus the clear and practicable principle enunciated by the Supreme Court, and followed in *Calvert*, is that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in *Dodson*, the professional is a full-time employee of the state.[1] Where the professional exercises custodial or supervisory authority, which is to say that he is not acting in his professional capacity, then a § 1983 claim can be established, provided the requisite nexus to the state is proved.

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[1] *Dodson* held that the employment relationship is only a "relevant factor" in determining whether the professional acted under color of state law. The primary consideration, established in *Dodson*, is the defendant's "function." Thus, the plaintiff would have to prove that the employment relationship created such an overbearing environment that the exercise of the independent professional judgment, the primary test, was impossible. The simple allegation of a close employment relationship between the state and the professional, absent any proof that that relationship had the effect of precluding independent judgment, is insufficient

In *Calvert* an inmate sued a private orthopedic specialist for an alleged failure to treat. The defendant was employed by a non-profit professional corporation, which in turn contracted with the state. We held that because private physicians exercise independent, professional judgment and render medical care in accordance with professional obligations, a physician when rendering such medical services does not act under color of state law. The defendant in *Calvert* had no supervisory or custodial functions.

We find the reasoning suggested by the appellant to differentiate the rule in *Dodson* from that enunciated in *Calvert* unpersuasive. Although the opinion in *Dodson* does point out that a public defender in effect plays a role adversarial to the interests of the state, that reasoning was the basis upon which the Supreme Court concluded that a professional may act without color of state law even when he is a full-time employee. In other words, even a full-time employee who is a professional can act without color of state law where his role in essence is adversarial to the interests of the state. Thus, "a public defender is not amenable to administrative direction in the same sense as other employees of the State." *Dodson* at 321. We do not need to address the problematic issue of whether the nature of the doctor-patient relationship can at times be adverse to the interests of the state. Where the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured.

The appellant is probably correct in his argument that the rule enunciated in *Dodson*, and followed in *Calvert*, has the effect of limiting the range of professionals subject to an *Estelle* action. This effect, however, is entirely consonant with the requirements of § 1983, which statute

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to satisfy the "color of state law" element of a § 1983 claim. The employment relationship is but one factor in determining whether the professional exercised independent judgment.

subjects the individual to liability only where he has acted under color of state law in violating a constitutional right. In any event, it is not for this court to tamper with the limitation of § 1983 liability established in *Dodson*. We therefore decline to overrule *Calvert v. Sharp*.[2]

III.

The appellant suggests that should this court decline to overrule its prior decision, we should distinguish it. We decline to do so. The fact that the doctor in *Calvert* was employed by a professional corporation, which in turn had contracted with the state, whereas Dr. Atkins, a sole practitioner, entered into that contract himself, makes no difference. A professional exercises his professional discretion pursuant to his professional obligations whether he practices alone or in a group. The effect of adopting the distinction suggested by the appellant would be to absolve one professional from liability concerning the same course of conduct and wilful failure to treat undertaken by another professional simply on the grounds that the former had associated himself with a group practice. Liability for a constitutional violation arising from a wrong done to an inmate should not rest on the contractual arrangement entered into by the putative defendant with third parties. The effect of such a rule would be to discourage any professional not associated with a group practice from serving the medical needs of prisoners. Such a rule would have the deleterious effect of increasing the cost and reducing the availability of medical services for prisons.

The other grounds of distinction proffered by the appellant are equally unpersuasive.

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[2] We also reject appellant's contention that the provision of medical services to the inmates is an "exclusive state function." Decisions made in the day-to-day rendering of medical services by a physician are not the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. *See Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982).

IV.

We find no reason to disturb the district court's dismissal of the appellant's claims against appellees McNamara and Hunt. Pursuant to 28 U.S.C. § 1915(d), claims made by pro se litigants can be dismissed if frivolous; that is, if "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979), *quoting Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

Respondeat superior is not available for § 1983 actions, and so the appellant must allege personal involvement by appellees Hunt and McNamara in the deprivation of his constitutional rights. Because the alleged deprivation of constitutional rights in this case involved the alleged failure to render medical services properly, the "personal involvement" of these appellees must be relevant to the alleged deprivation. The appellant has alleged no facts which would show that appellees McNamara or Hunt had the authority to overrule the medical judgment of Dr. Atkins. The fact that the appellant had mailed to appellee McNamara two letters complaining about Dr. Atkins' treatment does not suffice to render McNamara liable for Atkins' medical judgments. We therefore affirm the district court's dismissal of these claims.

AFFIRMED.

WINTER, Chief Judge, concurring and dissenting:

When the panel heard this appeal, it could not, under our established practice, question the correctness of the holding in Calvert v. Sharp, 748 F.2d 861 (4 Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985). At most, it could seek to distinguish *Calvert*, if a reasonable basis for distinction could be developed, or it could conclude that the correctness of *Calvert* was not presented because the physician who treated West was not guilty of deliberate indifference to West's serious medical needs. The panel opinion, in which I joined, pursued much the latter course. It sought to have the district court determine whether the physician was chargeable with deliberate indifference so that the necessity of addressing the correctness or distinguishability of *Calvert* could be certain.

An in banc court possesses greater authority. It is free to re-examine the correctness of the court's precedents and to overrule them if it determines that they were incorrectly decided. As a member of the in banc court, I am of the view that *Calvert* is an aberration and that it should be overruled. Alternatively, I think that *Calvert* should be confined to its facts and that this case is sufficiently different so as to render *Calvert* inapplicable.

I would therefore reverse the summary judgment in favor of Dr. Atkins, and I respectfully dissent from the majority's contrary decision. I concur, however, in affirming the dismissal of the action against McNamara and Hunt.[1]

I.

There are several grounds for concluding that services rendered by prison doctors—whether permanent members of a prison medical staff, or under limited contract with

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[1] The record contains no evidence that Hunt had notice of West's complaints and, in my view, such evidence is so scant as to McNamara's notice that I perceive no basis on which to hold them liable. Of course, § 1983 does not recognize liability under the doctrine of respondeat superior.

the prison—constitute action "under color" of state law, for purposes of § 1983, and that, as a consequence, *Calvert* was wrongly decided.

A. Prison doctors are state actors

Without doubt such state employees as prison guards and wardens are "state actors" subject to § 1983 liability. Moreover, the panel in *Calvert* implicitly conceded that a doctor who is (1) permanently employed on the medical staff of a prison, and (2) who has "custodial and supervisory duties" acts "under color of state law" when treating prisoners. The question then becomes whether the absence of either of these factors require a different conclusion. I think not.

All employment relationships are regulated by contract. The fact that the contractual arrangement between Dr. Atkins and the prison does not require Dr. Atkins to work exclusively for the prison should not strip his conduct of its essentially governmental nature when he is performing such service. Indeed, as the majority opinion notes, "[l]iability for a constitutional violation arising from a wrong done to an inmate should not rest on the contractual arrangement entered into by the putative defendant with third parties." *Ante* at 6.

The absence of custodial and supervisory functions is equally irrelevant to the state action issue. Although the Supreme Court, in Polk County v. Dodson, 454 U.S. 312, 319-21 (1981), invoked this factor to contrast the role of the public defender in *Polk* with that of the doctors in Estelle v. Gamble, 429 U.S. 97 (1976) and O'Connor v. Donaldson, 422 U.S. 563 (1975), I think that the *Calvert* panel misapplied this discussion in *Polk*. *Estelle* did not turn on the supervisory role of the doctor there; the complaint was premised solely on the medical treatment given. *See Estelle*, 429 U.S. at 103; *id.* at 104, n.10 (citing with approval several court of appeals decisions upholding claims of deliberate indifference without any mention of supervisory and custodial duties). *See also*

Polk, 454 U.S. at 331 (Blackmun J., dissenting) (noting that claims in *Estelle* and *O'Connor* were unrelated to the custodial and supervisory functions of the doctors there). I think it clear that *Polk* turned on the inherently adversarial relationship between public defenders and the state. 454 U.S. at 320-22.[2] The *Polk* Court discussed the custodial and supervisory functions of the doctors in *Estelle* and *O'Connor* simply in order to highlight the cooperative relationship between the doctors and the state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state. There is no suggestion that performance of custodial and supervisory duties is a prerequisite for a finding that doctors act under color of state law. Indeed, such a requirement would bar many deliberate indifference claims: it seems unlikely that those with supervisory and custodial functions will often be directly involved with patient care, yet § 1983 is not available for claims based on the principle of respondeat superior.

There is no significant difference between the doctor-employees in *Estelle* and *O'Connor*, and Drs. Atkins and Sharp. While Dr. Sharp had a contract with a professional association which, in turn, had a contract with the state, it is fair to say that each of these doctors worked under contract with the state, received payment from state funds, were subject to regulation by state and professional review boards, and performed services that the state is obligated to provide to prison inmates.

The majority's assertion in this case, that where a "professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured" (*ante* at 5), is supported by nothing in the record, and completely disregards the American Medical Association Standards for Health Serv-

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[2] Although *Calvert* asserts that "[t]he loyalty owed by Dr. Sharp was potentially adverse to the interests of the state," 748 F.2d at 863, no basis for this speculation is offered, nor does one readily spring to mind.

ices in Prisons (1979), that prescribe the relationship between medical personnel and other prison officials as one of "close cooperation and coordination"; a "joint effort." Preface at i; Std. 102 & Discussion. The rationale employed by the majority would preclude a § 1983 action against any medical professional who has treated a prison inmate since, by virtue of the exercise of their 'independent professional' judgment, they could never be considered state actors—notwithstanding the holding in *Estelle v. Gamble*.

Defendants' brief argues that contractual medical service providers are "independent contractors rather than . . . employees," noting that no social security taxes are withheld from their paychecks and they receive no benefits enjoyed by state employees. But if this is the basis for delimiting § 1983 liability, the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to "private" actors, when they have been denied. Such a result is intolerable.

B. "Public Function" Rationale

Action "under color" of state law will be found if an otherwise private party performs a function that has been "traditionally the exclusive prerogative of the State." Blum v. Yaretzky, 457 U.S. 991, 1011 (1982). The incarceration of convicted criminals surely falls within that category. And because "[a]n inmate must rely on prison authorities to treat his medical needs . . . [it is] the *government's obligation* to provide medical care for those whom it is punishing by incarceration . . . . '[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'" *Estelle*, 429 U.S. at 103-04 (emphasis added) (citations omitted). *Accord* Bowring v. Godwin, 551 F.2d 44, 46-47 (4 Cir. 1977).

The panel in *Calvert*, 748 F.2d at 864, and the majority opinion here, *ante* at 6 n.2, asserted that medical

care is not within the exclusive prerogative of the state. That observation, however, is incorrect in the *prison context*, where the state has complete control over the circumstances and sources of a prisoner's medical treatment.[1] The view espoused here has been explicitly endorsed in other cases where the doctor operates under contract to the state. A good example is Ort v. Pinchback, 786 F.2d 1105, 1107 (11 Cir. 1986):

> . . . we hold that the district court erred as a matter of law in concluding that a physician who contracts with the state to provide medical care to inmates does not act under color of state law. In Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985), we pointed out that medical personnel need not be state employees in order that their actions be considered state action under 42 U.S.C. § 1983. We held that the employees of a private entity hired by a county to provide medical care to jail inmates acted under color of state law so as to be subject to liability under § 1983. *Id.* at 703. Dr. Pinchback similarly performed "a function which is traditionally the exclusive prerogative of the state" when he took over the state's responsibility for attending to inmate medical needs. *Id.*; *see* Morrison v. Washington County, Ala., 700 F.2d 678, 683 (11th Cir. 1983).

See also Hall v. Ashley, 607 F.2d 789 (8 Cir. 1979) (upholding § 1983 deliberate indifference action against orthopedic surgeon operating under contract to prison). *Cf.* Briley v. State of Cal., 564 F.2d 849, 853, 856 (9 Cir. 1977) ("private" physician, "while serving as [county] medical examiner and advising at the [plea]

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[1] Although in *Calvert*, and unlike the situation in this case, the prisoners were allowed to go outside the prision to a doctor of their choice, this privilege was available only by virtue of a state statute. 748 F.2d at 864.

bargaining stage, was clearly clothed with the authority of state law, satisfying the 'state action' requirement of § 1983").

C. "Joint Action" Rationale

"It is enough that [a private party] is a willful participant in joint activity with the State or its agents" to render him liable under § 1983. United States v. Price, 383 U.S. 787, 794 (1966). *Accord* Lugar v. Edmondson Oil Co., 457 U.S. 922, 931-32 (1982). Thus, even if we assume that the doctor is not a public employee, the integral role that he plays within the prison medical system nevertheless qualifies his actions therein as "under color" of state law. The AMA Standards for Health Services in Prisons, described *supra*, provide that medical personnel and other prison officials are to operate in "close cooperation and coordination" with each other, in a "joint effort." There is no reason to believe that this mandate applies differently depending on the nature of the employment contract between doctor and prison.

It is significant to note that the Supreme Court in *Polk* recognized the viability of the joint participation rationale, but found it inapplicable to the adversarial relationship between the state and the public defender in that case. 454 U.S. at 322 n.12. More significant is the subsequent decision in Tower v. Glover, 467 U.S. 914 (1984), where the Court held that even a public defender acts under color of state law when he conspires with state officials to deprive another of constitutional rights. The same principle holds for prison doctors.

D. Impact of relationship with the state

Critical to *Calvert*'s conclusion that the doctor did not act under color of state law was the panel's repeated assertion that the doctor-patient relationship was in no way changed by virtue of the doctor's employment by the state. 748 F.2d at 863-64. From this the panel concluded that the doctor was an independent actor, rather than a

true agent of the state. However, this position ignores the AMA standards cited *supra*, which dictate close cooperation between the doctor and other state officials. Conversely, to the extent that *Calvert* is correct in its description of the ethical obligations of physicians, 748 F.2d at 863, these obligations would be the same for the *medical decisions* of the staff doctors in *Estelle* and *O'Connor*, who are acknowledged to act under color of state law.

Thus I conclude that *Calvert* is fatally flawed. It should not be followed here. Indeed, it should be overruled. Consistent with *Estelle* and *O'Connor*, Dr. Atkins should be found to have acted under color of state law in providing medical care to West.

II.

Even if my rejection of *Calvert* is not well-founded, I do not believe that decision controls the outcome here. I perceive the following valid bases for distinguishing this case from *Calvert*:

A. Absence of prisoner-patient choice of doctor/medical care

Although it argued that diagnosis and treatment are not the exclusive prerogative of the state, the *Calvert* panel answered the "public function" argument primarily by stressing that Maryland law allows inmates to go outside the prison and obtain medical care of their choice. In this case, however, North Carolina law bars all but minimum security prisoners (which West is *not*) from exercising such an option. West was thus totally dependent on the state's chosen medical care providers; for West, that meant Dr. Atkins. If there was any uncertainty in *Calvert* that the medical care received by that plaintiff was exclusively within the state's control, such uncertainty is not present in this case. Dr. Atkins was chosen by North Carolina to fulfill the state's constitu-

tional obligation to provide inmates like West with adequate medical care. North Carolina should not be permitted to plead a lack of responsibility because it delegated the task to a "private" party.

The Fifth Circuit adopted this view in Robinson v. Jordan, 494 F.2d 793, 794-95 (5 Cir. 1974):

> The trial judge alternatively stated: "It additionally appears that a doctor hired to treat prisoners is not acting under color of state law . . . . This holding was erroneous since Dr. Gates acted solely in his official capacity as a county health officer in treating appellant. This was state action . . . . Dr. Gates was not acting as a private physician but treated Robinson at the Sheriff's request because of his official employment.
>
> The cases relied on by the district judge holding that suits may not be maintained under Section 1983 against privately retained attorneys or court-appointed attorneys are inapposite. Robinson's detention prevented his seeking a physician of his choice. He did not enjoy the option of dismissing his doctor and securing another such as that open to a client dissatisfied with an attorney, appointed or retained. He was required to depend totally upon Dr. Gates, the county physician. (citations omitted)

B. Dependence on the state

Although *Calvert* found Dr. Sharp to have abundant non-state resources, 748 F.2d at 863, it appears (although the record is too sparse to be certain) that Dr. Atkins was heavily dependent on state funds. Moreover, it seems that Dr. Atkins' private practice, outside the prison, was significantly more limited than Dr. Sharp's. The risk that Dr. Atkins would feel compelled to adapt his medical judgments to accommodate his state employer, in conformity with the AMA's mandate to cooperate with the state, is far greater in these circumstances.

C. Absence of an intermediary

Dr. Atkins was employed directly by the state, much as any other state employee, including the doctors in *Estelle* and *O'Connor*. Dr. Sharp, however, was employed by a private association, which in turn was under contract to the state—a factor emphasized in *Calvert*, 748 F.2d at 863. The presence of the intermediary in *Calvert* helped to insulate Dr. Sharp from state administrative influence and pressure—a buffer unavailable to Dr. Atkins in this case.

These considerations serve to distinguish *Calvert* and to limit it to its discrete facts. If *Calvert* is not to be overruled, and it is my preference to do so, I think that it should be so limited.

For these reasons, I would reverse the summary judgment for Dr. Atkins that was granted by the district court and remand the case for further proceedings. In short, I would hold that Dr. Atkins acted under color of state law in treating West, and I would direct the district court to determine if Dr. Atkins is chargeable with deliberate indifference to West's medical needs.

Judge Phillips and Judge Ervin authorize me to say that they join in this opinion.

SUPREME COURT OF THE UNITED STATES

No. 87-5096

QUINCY WEST,

Petititoner

v.

SAMUEL ATKINS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 19, 1987

No. 87-5096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

QUINCY WEST

Petitioner,

v.

SAMUEL ATKINS

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Do prison physicians—whether permanent members of a state prison medical staff, or under contract with the state prison system—act under color of state law for purposes of § 1983 liability in their treatment of state prison inmates?

2. Did a physician who was under contract to provide orthopedic services to inmates at a state prison hospital act under color of state law for purposes of § 1983 in his treatment of a North Carolina state prison inmate?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Quincy West, and defendants Samuel Atkins, Rae McNamara, and James B. Hunt. Samuel Atkins is a physician who was acting under contract to the North Carolina Department of Correction, Rae McNamara is the former head of the North Carolina Division of Prisons, and James B. Hunt is the former governor of North Carolina.

The district court dismissed the claims against defendants McNamara and Hunt and the court of appeals dismissed plaintiff's interlocutory appeal of that order on April 23, 1985. On September 3, 1986, a panel of the Fourth Circuit affirmed the dismissal of defendant Hunt, but vacated the dismissal of defendant McNamara.

In its en banc decision, the Fourth Circuit reaffirmed the district court's dismissals of defendants McNamara and Hunt. Petitioner does not challenge these dismissals and thus defendant Atkins is the only respondent in this case.

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OPINIONS BELOW

The April 9, 1987 en banc opinion of the Court of Appeals for the Fourth Circuit is reported at 815 F.2d 993, and is reprinted in the Joint Appendix 43-57 (hereinafter cited as "J.A.").

The September 3, 1986 panel opinion of the Court of Appeals is reported at 799 F.2d 923. J.A. 39-41. On November 12, 1986, the Court of Appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. J.A. 42.

The June 7, 1985 order of the United States District Court for the Eastern District of North Carolina (Boyle, Terrence W.) has not been reported. J.A. 37-38.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were issued on April 9, 1987. The petition for a writ of certiorari was filed on July 8, 1987 and was granted on October 19, 1987. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1983.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner Quincy West, a state prison inmate, suffered a badly torn Achilles tendon on July 30, 1983, while playing volleyball at Odom Prison in Jackson, North Carolina. Petitioner was taken to Woodland, North Carolina, where he was examined by Dr. John H. Stanley, who was under contract to provide medical care to inmates at Odom Prison. Dr. Stanley directed that petitioner be transferred for treatment at Central Prison Hospital in Raleigh, North Carolina. After his transfer on August 9, 1983, petitioner was examined for the first time by respondent, Dr. Samuel Atkins, an orthopedic surgeon employed by Central Prison. J.A. 4-5.

During the times relevant to petitioner's allegations, Central Prison Hospital was a 97-bed acute care hospital facility for the North Carolina Department of Correction's approximately 17,500 inmates. It employed only one full-time staff physician. The remaining dozen or so physicians were employed under contracts for less than full-time employment.

The respondent, Dr. Atkins, was one such "contract" physician. He was employed by the Department of Correction pursuant to a "Contract for Professional Services" under which he provided orthopedic care to inmates at Central Prison Hospital. J.A. 24-26. His duties included the following: to provide two orthopedic clinics per week, to see all orthopedic and neurological referrals, to perform surgery as scheduled, to conduct rounds as often as necessary for his surgical and other orthopedic patients, to coordinate with the physical therapy department, to request the assistance of neurosurgical consultants on spinal surgical cases, and to provide emergency on-call orthopedic services 24 hours per day. J.A. 24-26.

As a natural part of his contractual duties, Dr. Atkins supervised Department of Correction nurses and correctional health assistants during surgery, in his clinics, and on rounds. In addition, Dr. Atkins supervised inmates who worked as scrub technicians and surgical technicians, inmates who cleaned and sterilized instruments, and inmates who worked on each floor in his clinics and during rounds.

For his services, Dr. Atkins was paid $495 per clinic, nearly $1,000 per week, plus additional amounts for each surgery according to a schedule, thus producing income well over $50,000 annually depending on the number of surgeries he performed.[1]

On November 29, 1984, petitioner filed a *pro se* complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina against respondent Dr. Samuel Atkins, Director of Division of Prisons Rae McNamara, and Governor James B. Hunt, contending the defendants were deliberately indifferent to his serious medical needs for treatment of his torn Achilles tendon. J.A. 3-11. Petitioner complained that Dr. Atkins demonstrated a persistent, hostile indifference to his serious, painful and disabling injury from

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[1] In a contemporaneously pending lawsuit against Dr. Atkins and others challenging the conditions at Central Prison Hospital, Dr. Atkins testified at deposition that his income for his work at Central Prison tremendously exceed what he earned from his private practice, that he made as much as $30,000 annually at Central Prison for performing surgeries above the $50,000 he earned for conducting the clinics, that he spent considerably more time on his prison work than on his private practice and that by the time of this action, his surgical privileges at the Raleigh area hospitals had been withdrawn. *Hammond* v. *Woodard, Atkins, et al.*, Civil No. 84-844-CRT (E.D.N.C., filed July 27, 1984).

the time Atkins first examined petitioner on August 9, 1983 until petitioner brought suit on November 23, 1984, fourteen months later. J.A. 5.

Petitioner's *pro se* complaint revealed the following facts. It identified respondent, Dr. Atkins as "employed as an Orthopedic Surgeon at Central Prison Hospital," J.A. 4, who "had a bad reputation . . . for his . . . surgery and the denial of adequate treatment." J.A. 7. At their first meeting, Dr. Atkins told petitioner that he should be scheduled for surgery to repair the torn Achilles tendon. However, Atkins refused to operate, choosing instead to "experiment" on petitioner with a cast to see whether the injury would heal by itself. He refused petitioner's request for medication to relieve intense pain. Dr. Atkins' attitude towards petitioner was hostile. J.A. 5.

Petitioner next saw Dr. Atkins at the Central Prison Hospital later in August for a new cast after the initial cast disintegrated, and then again in September, 1983 when the second cast was removed. At that time, petitioner's leg was still badly swollen and painful. Atkins refused for a third time to give petitioner medication for his pain. J.A. 5. Petitioner was transferred back to Odom Prison.

Dr. Atkins' experiment had failed. Petitioner's leg remained swollen and painful. On his return to Odom Prison, he complained both about the lack of treatment and unrelieved pain. J.A. 5-6. He went on hunger strikes which resulted in his transfer on November 8, 1983 to lock-up at Central Prison. There petitioner immediately did everything he could to get Atkins to see him and treat him. He wrote to the Warden. He wrote to Atkins "pleading" that he see petitioner and do something for his pain and swollen leg. He complained daily to the nurse on his

cell block about his painful injury. In November, 1983, a psychiatrist saw petitioner's swollen leg and promised that he would be seen by Atkins and given medication or hospitalized, but nothing happened. J.A. 6.

After an additional four months, on January 10, 1984, petitioner was finally taken to the orthopedic clinic where Dr. Atkins briefly examined his swollen and painful leg. Atkins acknowledged that the injury had not healed, but provided no treatment and refused for the fourth time to give petitioner any medication even though petitioner had told him that the pain prevented him from walking. Atkins did prescribe high top tennis shoes, which petitioner never received. J.A. 7.

Petitioner saw Dr. Atkins for what turned out to be the last time on February 15, 1984. The swelling and pain had worsened. Dr. Atkins told petitioner that he would need to see petitioner on a regular basis and that surgery might be required to repair the tendon. J.A. 7-8. Despite acknowledging that petitioner's condition required continued medical attention, Dr. Atkins thereafter refused to see petitioner.

Petitioner continued to seek relief for his swollen leg and pain. Every time he would seek medication for his pain, the physician assistant would schedule him for an appointment with Dr. Atkins, which the doctor would not keep. On March 28, 1984, Nurse Earp examined petitioner's swollen leg and told him that he needed to be seen by Dr. Atkins. The following day Nurse Earp told petitioner that Dr. Atkins had written an order on petitioner's medical records releasing him as a patient and that Dr. Atkins would not see petitioner again. J.A. 8.

Petitioner registered complaints wherever he could. He wrote the Governor at least twice, J.A. 7, 9, the

Director of the Department of Correction at least three times, J.A. 7, 9 and 10, a Captain Curry, J.A. 9, and a Dr. Eppley, who was another physician employed at Central Prison, J.A. 9, all without effect.

On June 1, 1984, he filed a grievance against Dr. Atkins charging that Dr. Atkins had not seen him for three and one-half months despite the many efforts by petitioner and others to schedule appointments for him, that his injury had not healed and that he remained in constant pain. J.A. 9. The June 18, 1984 answer to the grievance promised some hope. "Inmate is scheduled to see Dr. Atkins on 6-21-84." J.A. 9. However, notwithstanding the apparent administrative decision that petitioner would be seen by Dr. Atkins, the order by Dr. Atkins on petitioner's medical records that petitioner would not be seen by Dr. Atkins was obeyed. As with other scheduled appointments to see Dr. Atkins, when the appointed day came, petitioner was not taken to see him.

Instead of seeing Dr. Atkins, a week later petitioner was abruptly transferred back to Odom Prison, away from Dr. Atkins. At Odom, petitioner continued to experience the pain and swelling. When he filed this action in November, 1984, he was still in great pain, he had a "terrible limp," he could not run, jump or squat, and the circulation in his leg was poor. J.A. 10. He prayed for a court appointed expert to examine his leg and foot, an injunction directing that he be provided with medical care other than by Dr. Atkins and for compensatory and punitive damages. J.A. 11.

On December 10, 1984, District Judge Terrence W. Boyle ordered that the claims against defendants Rae McNamara and James B. Hunt be dismissed as frivolous under 28 U.S.C. § 1915(d). That order also held that the "claims against defendant Adkins [sic] are not frivolous, and the plaintiff may proceed against him." J.A. 12.

On April 22, 1985, defendant Atkins filed motions to dismiss and for summary judgment together with affidavits to support his assertion that he did not act under color of state law. J.A. 13-29. On June 7, 1985, the district court allowed defendant Atkins' motion for summary judgment, J.A. 37, holding that Atkins was not acting under color of state law for purposes of § 1983, relying on *Calvert* v. *Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert denied*, 471 U.S. 1132 (1985), which had held that a physician who was employed by a professional association under contract to provide medical services to inmates in the Maryland state prison system was not acting under color of state law for purposes of § 1983 when he provided orthopedic services to inmates.

At the time he ruled on the motion for summary judgment, Judge Boyle had before him: an affidavit by Dr. Atkins stating that he made his own medical decisions according to standards established by the A.M.A., J.A. 22-23; an affidavit by the North Carolina Division of Prisons Director of Health Services, stating that Dr. Atkins was an independent contractor and not a state employee, and that he exercised his own independent medical judgment when providing medical services to inmates, J.A. 27-29; and a copy of Dr. Atkins' "Contract for Professional Services," J.A. 24-26 as described above. The Atkins submissions on his motion for summary judgment did not show the extent, if any, of his non-prison practice or the extent to which Atkins depended upon the prison work for his livelihood.[2]

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[2] The facts regarding the extent of Dr. Atkins' work at Central Prison, his income from his contact with Central Prison, and his dependence on that income developed in another action in the same court, as described in note 1 above, were, of course, not available to this *pro se* incarcerated plaintiff to put before the court in response to

Petitioner filed notice of appeal to the Fourth Circuit on June 17, 1985. On November 18, 1985, the Court of Appeals appointed Richard E. Giroux of North Carolina Prisoner Legal Services, Inc., to represent petitioner.

On appeal, petitioner argued both that *Calvert* was decided wrongly and should be overruled, and that, in the alternative, his case should be distinguished from *Calvert*. On September 3, 1986, a panel of the court of appeals held that a determination of whether Dr. Atkins had been deliberately indifferent to petitioner's serious medical needs should be made before addressing the issue of whether Dr. Atkins was acting under color of state law for purposes of § 1983. The grant of summary judgment to Samuel Atkins and the dismissal of Rae McNamara were vacated, and the case remanded to the district court. J.A. 39-41.

On November 12, 1986, the court of appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the *en banc* court. J.A. 42. On April 9, 1987, a divided court affirmed the district court's dismissal of the claims against McNamara and Hunt and the grant of summary judgment in favor of Atkins. The holding of the court is not altogether clear. It appears to be that "a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where . . . the profes-

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Atkins' motion for summary judgment. Nevertheless, the rule is that "a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) *(quoting Haines* v. *Kerner*, 404 U.S. 519 (1972)).

sional is a full-time employee of the state," J.A. 45, because "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." J.A. 46. It may be, however, that the majority held more narrowly "that '[t]hese professional obligations and functions of a private physician establish that such a physician does not act under color of law when providing medical services to an inmate.'" J.A. 42 *(quoting Calvert* v. *Sharp*, 748 F.2d at 863).

Chief Judge Winter, joined by Judges Phillips and Ervin, dissented. Judge Winter expressed the view that prison doctors, "whether permanent members of the prison staff or under limited contract with the prison," J.A. 49-50, act under color of state law in providing medical care to prisoners and that respondent in this case so acted. The dissenters stated that the provision of medical care to prisoners is an exclusive state function and therefore prison doctors providing medical services to prisoners act under color of state law. J.A. 52-54. They also asserted that a prison doctor acts under color of state law because of "the integral role that he plays within the prison medical system . . . ." J.A. 54. The dissenters believed that the rule applied by the majority "would preclude a § 1983 action against any medical professional who has treated a prison inmate since, by virtue of the exercise of their independent, professional judgment, they could never be considered state actors - notwithstanding the holding in *Estelle* v. *Gamble*." J.A. 52.

On October 19, 1987, this Court issued its writ of certiorari to review the opinion of the Court of Appeals.

SUMMARY OF ARGUMENT

The Fourth Circuit's holding, that a prison doctor does not act under color of state law when he exercises profes-

sional judgment, is directly contrary to the spirit and the letter of *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The Court held in *Estelle* that "deliberate indifference to a prisoner's serious illness or injury," whether by a prison guard or a prison doctor, constitutes cruel and unusual punishment prohibited by the Eighth Amendment and "states a cause of action under 42 U.S.C. § 1983." *Id.* at 104. This is so because contemporary standards of decency "establish the government's obligation to provide medical care for those whom it is punishing by incarceration." *Id.* at 103.

An *Estelle* action is a straightforward suit under § 1983 to provide a "remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961). A prison doctor employed by the state to provide medical services required by the Eighth Amendment is a state official amenable to suit under § 1983.

The majority decision below rest entirely on its erroneous reading of *Polk County* v. *Dodson*, 454 U.S. 312 (1981), the only case in which this Court has determined that a person paid directly by the state who is sued under § 1983 for abusing his position was not acting under color of state law. *Dodson* was an exceptional case producing a limited holding: "[W]e decided *only* that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel in a criminal proceeding." 454 U.S. at 325 (emphasis added).

In *Dodson*, the putative state actor, the public defender, was a public employee fulfilling a function traditionally performed by private lawyers. In performing that role, her professional obligations required her to retain all of the essential attributes of the private lawyer. Those attributes included her "professional independence"

which the state was constitutionally obliged to respect, 454 U.S. at 321-22, and which required her to be adversarial to the state. Thus, this Court concluded that the public defender does not act under color of law when performing the traditional functions of a lawyer representing a client in a criminal case because in that "capacity a public defender is not acting on behalf of the State; he is the State's adversary." 454 U.S. at 322-23 n. 13.

In contrast to a public defender, the prison physician's professional obligations do not make him "the State's adversary." In North Carolina, the relationship between prison doctors and other prison authorities "is a joint effort of correctional administrators and health care providers . . . ." North Carolina Division of Prisons Health Care Manual (hereafter *"Manual"*) § 100.5 (reprinted at p. 7 of appendix attached at conclusion of petitioner's brief, hereafter "App"). "[I]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." *Id.* A prison doctor serves within the prison together with its whole staff to "provide medical care for those whom [the state] . . . is punishing by incarceration," *Estelle*, 429 U.S. at 103, an activity mandated both by the Eight Amendment and by North Carolina law. N.C. Gen. Stat. § 148-19 (1983)(App. 19). These are services provided to North Carolina prisoners only by the state. The inmate may neither employ nor elect to see a different doctor of his choice.

The general notion of professional independence and integrity which for the Fourth Circuit removes prison doctors from § 1983 purview conflicts directly with other decisions by the Court which have identified professionals as state actors. *See, e.g.*, *Parham* v. *J.R.*, 442 U.S. 584, 606-07 (1979), (at proceedings to commit juveniles to a

mental institution, a professional supplies the required due process of law by exercising his professional judgment; thus the state action is the exercise of professional judgment); *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982) (a professional at a state institution for the mentally retarded is liable under § 1983 for violating constitutional rights of patients "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment").

Dr. Atkins was fully vested with state authority to fulfill essential aspects of the duty placed on the State by the Eighth Amendment "to provide medical care for those whom it is punishing by incarceration." *Estelle*, *supra*, 429 U.S. at 103. His contract with the state required him to provide regular, substantial orthopedic services at the prison hospital for a large prison population for which he received a base pay of more than $50,000 annually and additional fees for each surgery. He therefore was acting under color of state law in that capacity. "If an individual is possessed of state authority and purports to act under that authority, his action is state action." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964).

Dr. Atkins' official status and authority at Central Prison was confirmed by the response of other prison officials to Dr. Atkins' orders concerning petitioner. When Dr. Atkins placed an order in petitioner's medical files that petitioner was released from Atkins care and would not be seen by him any more, J.A. 8, that order was obeyed in spite of frequent efforts by various officials to schedule petitioner to be seen by Dr. Atkins for the care of petitioner's injured leg and treatment of his constant pain.

Dr. Atkins acted together with a host of prison officials to withhold needed medical care from petitioner. He

thereby acted under color of state law. "[P]rivate persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Dennis* v. *Sparks*, 449 U.S. 24, 27-28 (1980); *Tower* v.*Glover*, 467 U.S. 914 (1984); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725-726 (1961). Moreover, the state has "so far insinuated itself into a position of interdependence with [Dr. Atkins] that it must be recognized as a joint participant in the challenged activity . . . ." *Burton* v. *Wilmington Parking Authority*, 365 U.S. at 725.

ARGUMENT

The holding of the Fourth Circuit in this case is not entirely clear. Most likely it is that "a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where . . . the professional is a full-time employee of the state," J.A. 45, because "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." J.A. 46. It is also possible that the court more narrowly held, consistent with its earlier decision in *Calvert* v. *Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985), which it "decline[d] to overrule," J.A. 47, that Dr. Atkins did not act under color of law because he performed medical services at the prison hospital under a contract for less than full-time employment.[3] In either case, whether Dr.

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[3] The opinion below begins:

> "In *Calvert* v. *Sharp*, 748 F.2d 861, 863 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985), we held that '[t]he professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical services to an inmate.' Prisoner West brought

Atkins was a permanent member of the state prison staff was irrelevant to the holding below that he was not acting under color of law.

Petitioner contends here that, read broadly or narrowly, the Fourth Circuit decision below was wrongly decided. Every other circuit which has considered the issue has concluded, at least by implication,[4] that prison physicians act under color of state law when treating incarcerated persons.[5] In part I petitioner will show that

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this § 1983 action against a private physician who was under contract for part-time employment with the state to provide two orthopedic clinics per week at North Carolina Central Prison Hospital. Because we perceive no valid reason to overrule or distinguish *Calvert*, we affirm the district court's dismissal of the appellant's claim." J.A. 43-44.

[4] This Court in *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 927, referring to its decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), stated that: "Each of these cases involved a finding of state action as an implicit predicate of the application of due process standards."

[5] First Circuit: *Miranda* v. *Munoz*, 770 F.2d 255 (1st Cir. 1985) (upheld jury verdict in a § 1983 action against physician, who worked at a jail eight hours per week).

Second Circuit: *Todaro* v. *Ward*, 565 F.2d 48 (2nd Cir. 1977) (affirmed district court judgment against, among others, a surgical consultant at a women's correctional facility in New York).

Third Circuit: *Norris* v. *Frame*, 585 F.2d 1183 (3rd Cir. 1978) (remanded a pretrial detainee's § 1983 claim against, among others, a prison physician).

Fifth Circuit: *Murrell* v. *Bennett*, 615 F.2d 306 (5th Cir. 1980) (upheld § 1983 action by *pro se* Alabama inmate against prison physician for alleged failure to provide proper medical treatment). *See also Robinson* v. *Jordan*, 494 F.2d 793 (5th Cir. 1974) (cited extensively by Judge Winter in his dissent below at J.A. 56).

Sixth Circuit: *Byrd* v. *Wilson*, 701 F.2d 592 (6th Cir. 1983) (upheld § 1983 action challenging the failure of the medical staff, including two

the 'unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976), upon a prisoner by a doctor who is a permanent member of the state prison

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physicians, to provide adequate medical care at a Kentucky State Penitentiary).

Seventh Circuit: *Duncan* v. *Duckworth*, 644 F.2d 653 (7th Cir. 1981) (*pro se* civil rights action against prison hospital administrator allowed to proceed until identity of the members of the medical staff responsible for the alleged delay in treatment could be designated).

Eighth Circuit: *Hall* v. *Ashley*, 607 F.2d 789 (8th Cir. 1979) (remanded for a new trial in § 1983 action against orthopedic physician employed by the Arkansas Department of Correction). *See also Kelsey* v. *Ewing*, 652 F.2d 4 (8th Cir. 1981) (upheld § 1983 action against a physician who provided medical services at a Minnesota prison pursuant to a contract with the Minnesota Department of Correction); *Mullen* v. *Smith*, 738 F.2d 317 (8th Cir. 1984) (inmate's allegations stated an Eight Amendment claim sufficient to survive motion for dismissal; one of the defendants was a prison physician).

Ninth Circuit: *Broughton* v. *Cutter Laboratories*, 622 F.2d 458 (9th Cir. 1980) (upheld *pro se* § 1983 action against, among others, two prison physicians, alleging denial of medical treatment. The court remanded to allow the prisoner to amend his complaint to allege facts sufficient to support an action for deliberate indifference). *See also, Briley* v. *State of Cal.*, 564 F.2d 849, 853, 856 (9th Cir. 1977) (private physician, "while serving as [county] medical examiner and advising at the [plea] bargaining stage, was clearly clothed with the authority of state law, satisfying the 'state action' requirement of § 1983") (as cited by Judge Winter in his dissent below in this case at J.A. 53-54).

Tenth Circuit: *Daniels* v. *Gilbreath*, 668 F.2d 477 (10th Cir. 1982) (held that psychiatrist was acting under color of law even though evidence against state hospital psychiatrist insufficient to meet the constitutional standard).

Eleventh Circuit: *Ort* v. *Pinchback*, 786 F.2d 1105 (11th Cir. 1986) (upheld § 1983 action against physician under contract with state to provide medical care to inmates); *Ancata* v. *Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985) (upheld § 1983 action against private entity under contract with state to provide prison health services).

staff is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and constitutes action under color of state law which is actionable under 42 U.S.C. § 1983. In part II the petitioner will demonstrate that respondent Dr. Atkins, who was employed under contract by the Central Prison Hospital to provide orthopedic services for prisoners at the prison hospital on a regular but less than full-time basis, acted under color of law when over a fourteen month period he experimented on petitioner instead of performing the surgery he told petitioner was needed, refused to take appropriate steps to repair petitioner's torn Achilles tendon, abruptly ceased seeing petitioner despite acknowledging that petitioner needed continuing orthopedic care, and continuously refused to treat petitioner's severe and constant pain.

I

A PRISON PHYSICIAN WHO IS A PERMANENT MEMBER OF THE STATE PRISON STAFF ACTS UNDER COLOR OF LAW WHEN HE RENDERS MEDICAL CARE TO PRISONERS AND , IF IN SO DOING HE INFLICTS CRUEL AND UNUSUAL PUNISHMENT, HE IS LIABLE TO THE PRISONER UNDER 42 U.S.C. § 1983

A. A Prison Doctor Who Deliberately Denies Medical Care Resulting In Unnecessary Pain And Suffering Thereby Imposes Cruel And Unusual Punishment.

The holding of the Fourth Circuit in this case, that a prison doctor does not act under color of state law when he exercises professional judgment, is directly contrary to both the spirit and the letter of this Court's decision in *Estelle* v. *Gamble*, 429 U.S. 97 (1976). This Court held in that decision that "deliberate indifference to a prisoner's serious illness or injury," whether by a prison guard or a

prison doctor, "states a cause of action under § 1983." *Id.* at 104.

Estelle rested on "elementary principles" of Eighth Amendment jurisprudence, which include the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 102-03 *(quoting Trop* v. *Dulles*, 356 U.S. 86, 101 (1958)). These standards "establish the government's obligation to provide medical care for those whom it is punishing by incarceration." *Id.* at 103. The contemporary standards mandating adequate medical care to people incarcerated by the state, this Court observed, are reflected in modern legislation of the state which codifies the long held common law view, as once expressed by the North Carolina Supreme Court, that: "'It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty care for himself.'" *Id.* at 104 *(quoting Spicer* v. *Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).[6] As this Court noted, "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle*, 429 U.S. at 103. If the failure of the authorities to provide medical treatment results in unnecessary "physical 'torture or lingering death,'" *id.* at 103 *(quoting In re Kemmler*, 136 U.S. 436, 447 (1890)), or unnecessary "pain and suffering which no one suggests would serve any

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[6] The mandate to provide adequate health care is now found in a North Carolina statute, N.C. Gen. Stat. § 148-19 (1983) (App. 19), and in officially promulgated regulations. 5 North Carolina Administrative Code (NCAC) 2E (App. 1-3). The latter states, *inter alia*, "G.S. 148-19, Health Services, specifies that the Department of Correction shall provide health services to prisoners which shall include preventive, diagnostic, and therapeutic measures . . . ." 5 NCAC 2E.0201 (App. 2).

penological purpose," *id.* at 103, then contemporary standards of decency and the Eighth Amendment are offended.

Estelle makes clear that such Eighth Amendment violations could be committed by any prison authority, "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* at 104-05. There is no question in *Estelle* that a prison doctor who renders treatment to inmates is a state actor.

The *Estelle* decision followed a large number of lower court opinions evaluating prisoners' medical care claims. *See* 429 U.S. at 104 n. 10, 105 nn. 11-12, 106 n. 14. *Estelle* confirmed the prior understanding that the denial of adequate medical care by prison guards and doctors could offend the Eighth Amendment. *Id.* at 105 nn. 11-12, 104 n. 10. It also confirmed the "essential agreement," that the proper Eighth Amendment standard is the "deliberate indifference" test, which is not satisfied by simple "inadvertent failure to provide adequate medical care," or a "negligent . . . diagnos[is] or treat[ment]." *Id.* at 105-06 (*quoting Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937)).

The import of *Estelle* is that when a prison physician shows that his action was within the range of accepted professional judgment, he has not violated the inmate's Eighth Amendment rights, although he may have acted negligently. This is so because the Court has carefully confined cruel and unusual punishment claims against doctors to instances of deliberate indifference to serious medical needs, and because it has explicitly excluded from the purview of such claims typical instances of medical

malpractice. Indeed, of the several cases which this Court cites as properly holding that a prison doctor's deliberate indifference to an inmate's serious medical needs violates his patient's Eighth Amendment rights, the first listed draws exactly this distinction. *Estelle*, 429 U.S. at 104 n. 10. Claims of constitutional violations are "attributable to 'deliberate indifference . . . rather than an exercise of professional judgment . . . .'" *Id. (quoting Williams* v. *Vincent*, 508 F.2d 541, 544 (2nd Cir. 1974)). In 1983 the Court fashioned an equivalent standard for evaluating substantive due process violations inflicted by doctors and other professionals upon patients at state institutions for the mentally retarded. *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982) ("substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.").

The effect of the Fourth Circuit decision below, however, is to foreclose, as a matter of law, the *Estelle* inquiry into whether a prison doctor was deliberately indifferent or whether he was exercising professional judgment. Instead, the prison physician who is charged with misconduct in the course of his medical treatment may not be sued for inflicting cruel and unusual punishment. He may indeed have been deliberately indifferent under *Estelle*, and yet, because he does not act under color of law by this analysis, he is insulated from suit. Under the Fourth Circuit's rule, even an intentional injury inflicted by a physician could not be redressed pursuant to 42 U.S.C. § 1983.

Only in the Fourth Circuit have prisoners been denied the opportunity to bring Eight Amendment claims against their doctors. In every other circuit, the courts

have continued to recognize such claims under § 1983.[7] Moreover, notwithstanding stringent standards required for proof of an Eighth Amendment medical claim, reports of post *Estelle* cases make clear that such violations may and do occur.[8]

The reasons that medical care in prisons continues to give rise to constitutional claims by prisoners are detailed in the two Amicus Curiae briefs filed in this case. The National Prison Project attributes the existence of deliberately indifferent medical treatment of inmates to "three primary reasons: . . . (1) the political process is unlikely by itself to protect the interests of prisoners in basic health care; (2) the medical care provided prisoners is likely to be isolated from the medical care provided in the community; and (3) market controls on the quality of services do not operate because prisoners uniquely have no option to reject the medical care proffered by the

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[7] *See*, e.g., *Ort* v. *Pinchback*, 786 F.2d 1105 (11th Cir. 1986) and cases listed in note 5 *supra* upholding § 1983 prisoner Eighth Amendment suits against prison doctors.

[8] E.g., *French* v. *Owens*, 538 F.Supp. 910 (S.D. Ind. 1982), *aff'd in rel. part*, 777 F.2d 1250 (7th Cir. 1985); *Green* v. *Carlson*, 581 F.2d 669 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980); *Wellman* v. *Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *Ramos* v. *Lamm*, 485 F. Supp. 122 (D. Col. 1979), *aff'd in rel. part*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Inmates of Alleghany County Jail* v. *Pierce*, 487 F. Supp. 638 (W.D. Pa. 1980); *Lightfoot* v. *Walker*, 486 F. Supp. 504 (S.D. Ill. 1980); *Ancata* v. *Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985). The particular acts giving rise to findings of cruel and unusual punishment in these cases are set forth in Amicus Curiae Brief of the American Civil Liberties Union Foundation, the National Prison Project of the ACLU Foundation, and the North Carolina Civil Liberties Union Foundation at Appendix I. (Hereinafter "Amicus Brief of the National Prison Project.")

state." National Prison Project Amicus Curiae Brief, p. 18. The American Public Health Association identifies similar factors: security considerations which permeate health care delivery in prisons; insufficient resources; entaglement of medical staff in custodial functions; the absence of free market regulatory mechanisms. Amicus Curiae Brief of the American Public Health Association, pp. 10-34. The availability of federal forum to inmates operates to ameliorate the consequences of those forces which tend towards producing medical care at an unconstitutional level in prison.

In *Estelle*, the Court explicitly identified "indifference . . . manifested by prison doctors in response to their prisoner's needs," 429 U.S. at 104, as a form of unconstitutionally cruel and unusual punishment and cited examples of just such conduct found by the lower courts. *Id.* n. 10. The decision below purports not to challenge *Estelle* on this basis. Nevertheless, it agrees with petitioner that it "has the effect of limiting the range of professionals subject to an *Estelle* action." J.A. 46. More than this, the effect of this decision is that the doctor who inflicts cruel and unusual punishment does so as a private citizen, not under color of law.[9]

B. A Doctor Who Is A Permanent Member Of The Prison Staff Is An Official Of The State And Acts Under Color Of Law In His Activities As A Prison Physician.

Estelle plainly recognizes that cruel and unusual punishment inflicted in the form of a prison doctor's delib-

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[9] The state of North Carolina regularly moves to dismiss State Tort Claim actions brought by prisoners against "contract" physicians. This includes virtually all such claims, since almost all prison medical care is now provided by doctors working under less than full-time contracts. *See*, e.g., *Jones* v. *N.C. Department of Correction*, TA-9423, N.C. Industrial Commission (1987); *Peterson* v. *N.C. Department of Correction*, TA-10570, N.C. Industrial Commission (1987).

erate indifference to the serious medical needs of his patients is actionable under 42 U.S.C. § 1983: "Regardless of how evidenced, deliberate indifference to a prisoner's illness or injury states a cause of action under § 1983." *Estelle*, 429 U.S. at 104. In so holding, the court merely approved the understanding of all the circuit courts. *Id.* at 106 n.14.

The cause of action identified in *Estelle* is a straightforward application of the firmly established doctrine that a defendant in a § 1983 suit acts under color of law when he abuses the position given to him by the state. That statute provides a "remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961).[10] Its purpose from inception has been "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of law, 'whether that action be executive, legislative or judicial.'" *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) *(quoting Ex Parte Virginia*, 100 U.S. 339, 346 (1880)).

It is only those authorized by the state to whom the inmate may turn for his medical needs. If the doctor fails

[10] "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" *Monroe* v. *Pape*, 365 U.S. at 184 (1961) *(quoting United States* v. *Classic*, 313 U.S. 299, 326 (1941), *rehearing denied*, 314 U.S. 707 (1941)). The Court has recently recognized § 1983 claims based on allegations that defendants acted under color of law by misuse of state power in a variety of circumstances. E.g., *Dennis* v. *Sparks*, 449 U.S. 24 (1980) (private party acts under color of state law when he corruptly acts in concert with a state judge); *Tower* v. *Glover*, 467 U.S. 914 (1984) (private parties act under color of state law when they act in concert with state officials to obtain plaintiff's criminal conviction).

in treating those needs, the inmate's only recourse is to the State. *Estelle*, 429 U.S. at 103 ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."). The State employs doctors to provide prisoners with medical care. By deferring to the professional judgment of its prison doctors, the State has transferred to them its obligations under the Eighth Amendment to render medical treatment within its prisons. When they so act, they do so "clothed with the authority of state law"; they are the "prison authorities" upon whom the prisoner must rely. They act under color of law.

A prison doctor, who is a permanent member of the prison staff, employed by the state to provide medical services, as required by state law and by the Eighth Amendment, is a state official amenable to suit under § 1983. "The involvement of a state official . . . plainly provides the state action[11] essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions . . . were officially authorized or lawful." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

Obedient to *Estelle*, all the circuit courts, save the Fourth, have continued to sort out prisoner § 1983 cases according to the standards there announced and have treated prison doctors as acting under color of law. Indeed, all other circuits have treated "private" doctors as acting under color of law when employed by the state to treat those it has incarcerated.

[11] *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 929-932 (1982), resolving some doubt, held squarely that a finding of "state action" fully satisfies the acting under color of state law requirement of § 1983.

C. The Court Below Has Misapplied *Polk County* v. *Dodson* In Ruling That A Prison Doctor Acting In His Professional Capacity Does Not Act Under Color Of Law.

The majority decision below, read narrowly or broadly, rests entirely on its reading of *Polk County* v. *Dodson*, 454 U.S. 312 (1981), the only case in which this Court has determined that a person paid directly by the state who is sued under § 1983 for abusing his position was not acting under color of state law.[12] This was an exceptional case producing a holding limited to its peculiar circumstances: "[W]e decide *only* that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel in a criminal proceeding."[13] 454 U.S. at 325 (emphasis added).

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[12] The facts giving rise to the case are also peculiar as they hardly suggest a colorable constitutional claim even had the public defender acted under color of state law. Richard Dodson was convicted for robbery. Public Defender Shepard was assigned to represent him on appeal. "After inquiring into the case, however, she moved for permission to withdraw as counsel on the ground that Dodson's claims were wholly frivolous," 454 U.S. at 314, following exactly the procedures prescribed for such situations in *Anders* v. *California*, 386 U.S. 738 (1976), and by Iowa appellate rules. 454 U.S. at 314 n. 2. Following notice to Dodson of Shepard's motion and her memorandum setting forth the legal arguments raised by the case, Dodson was allowed 30 days to inform the Iowa Supreme Court that he wanted his appeal considered. If it then found any point "not frivolous", it could then grant Shepard's motion to withdraw and appoint new counsel. *Id.* Shepard's motion was granted and the appeal dismissed. Dodson's § 1983 suit against Shepard alleging that she had deprived him of his right to counsel apparently gave no clue as to what non-frivolous legal argument she should have advanced for him on appeal.

[13] Justice Blackmun in dissent stresses the narrowness of the holding. "In essence, the Court appears to be holding a public defender exempt from § 1983 liability only when the alleged injury is ineffective assistance of counsel." 454 U.S. 312, 337.

Dodson was unusual as a state action case in two respects. First, it presented a putative state actor, the public defender, who was a public employee fulfilling a function traditionally performed by private lawyers.[14] This is just the reverse of the typical state action case, which asks whether a private person or entity is performing traditionally governmental activities or is so interrelated with state activity that the challenged activity is "fairly attributable to the State." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Second, the public defender, in performing the role historically entrusted to private lawyers, retains all of the essential attributes of the private lawyer as he goes about his tasks. Those attributes include most importantly his "professional independence" which the state is constitutionally obliged to respect. 454 U.S. at 321-22. In *Dodson*, the defendant did not allege that the state interfered with the public defender's independence, nor was this Court willing to assume such interference. "At least in the absence of pleading and proof to the contrary, we therefore cannot assume that Polk County, having employed public defenders to satisfy the State's obligations under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)], has attempted to control their action in a manner inconsistent with the principles on which *Gideon* rests." 454 U.S. at 322.

As stressed in *Dodson*, the professional independence of a criminal defense lawyer requires him to be adversarial to the state. "'[A]n indispensable element of the effective performance of his responsibilities is the ability to act

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[14] [S]tate employment is generally sufficient to render the defendant a state actor . . . ." *Lugar, supra*, 457 U.S. at 935-36 n. 18; "where the defendant is a government employee, this inquiry is relatively straightforward." *Blum* v. *Yaretzky*, 457 U.S. 991, 1013 (1982) (Brennan, J. dissenting).

independently of the Government and to oppose it in adversary litigation.'" 454 U.S. at 319 n. 8 *(quoting Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979)). Thus, this Court concluded that the public defender does not act under color of law when performing the traditional functions of a lawyer representing a client in a criminal case because in that "capacity a public defender is not acting on behalf of the State; he is the State's adversary." *Dodson*, 454 U.S. at 322-23 n. 13.

The professional obligation of the criminal defense lawyer to oppose the state is central to the criminal justice system. In a criminal prosecution, it is the state which investigates the case; it is the state which prefers the charges against the defendant; it is in the state's name that the charges are brought; and it is the state which vigorously prosecutes the defendant seeking his conviction. The defendant faces the state through his lawyer, whose undivided loyalty is to the defendant:

> In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of his client."

Id. at 318-19. Given the range of "adversarial functions"[15] performed by a defense lawyer, the Court found "it peculiarly difficult to detect any color of state law in such

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[15] "[I]t is the function of the public defender to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants." *Polk County* v. *Dodson*, 454 U.S. 312, 320 (1981).

activities." *Id.* at 320. These are the reasons that *Dodson* is the only decision by this Court holding that a state employee performing her assigned tasks was not acting under color of law.

In contrast to a public defender, a prison doctor treating inmates is not engaged in activities traditionally performed by private parties. As this Court noted in *Dodson*, in addition to their "traditionally private obligations" to their patients, "[i]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." *Id.* A prison doctor serves within the prison together with its whole staff to "provide medical care for those whom [the state] . . . is punishing by incarceration," *Estelle*, 429 U.S. at 103, an activity mandated both by the Eighth Amendment and by North Carolina law. N.C. Gen. Stat. § 148-19 (1983) (App. 19). These are services provided to North Carolina prisoners only by the state. The inmate has no choice. He may neither employ nor elect to see a different doctor.[16]

Nor do the physician's professional obligations set him in conflict with the state and other prison authorities. He is not "the State's adversary." *Dodson*, 454 U.S. at 322-23 n. 13. In North Carolina, the relationship between prison doctors and other prison authorities is the opposite of adversarial; it is a relationship of collaboration. The North Carolina Division of Prisons Health Care Manual declares that "[t]he provision of health care is a joint effort of

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[16] In some circumstances, minimum custody prisoners may be able to request outside health services at their own expense. Inmates such as petitioner in maximum, close or medium custody have no such opportunities. N.C. Division of Prisons Health Care Manual § 710 (App. 17-18) promulgated pursuant to 5 NCAC 2E.0200 (App. 2-3) and N.C. Gen. Stat. §§ 148-11; 148-19 (App. 19).

correctional administrators and health care providers and can be achieved only through mutual trust and cooperation."[17] Judge Winter noted similar policy statements promulgated by the American Medical Association describing a prison doctor's relationship with other prison authorities.[18] Not only is the doctor's relationship with other prison officials cooperative, but it may also affect medical decisions. *Dodson*, 454 U.S. at 320.[19] ("Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve."). Insofar as a state-employed attorney is analogous to a state-employed doctor, then, the more apposite decision on this issue is not *Dodson*, but *Tower* v. *Glover*, 467 U.S. 914 (1984) (public defender acts under color of state law when he acts in concert with state officials to sustain defendant's criminal conviction).

The majority below concluded that a full-time physician without custodial or supervisory duties does not act under color of state law. In reaching this conclusion, the majority did not find any functions adversarial to the state in the professional obligations of a prison physician. Instead, it found a broad overriding principle in *Dodson* that professionals as a class do not act under color of state law when acting in their professional capacities because "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." J.A. 46.[20]

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[17] *Manual* § 100.5 (App. 7), promulgated pursuant to 5 NCAC 2E.0200 (App. 2-3) and N.C. Gen. Stat. §§ 148-11; 148-19 (App. 19). The North Carolina Department of Correction regulations describe a coordinated, cooperative system of health care with the ultimate "responsibility on the Director, Division of Prisons to provide each inmate the medical, dental, and mental health services necessary to maintain basic health," 5 NCAC 2E.0201 (App. 2), and with the responsibility for the delivery of health services at each facility on the warden or institution head who is to appoint a specific "health authority." 5 NCAC 2E.0202 (App. 2). The institution head and the health authority are to meet at least quarterly, 5 NCAC 2E.0205 (App. 3), and health policies are to be reviewed annually. 5 NCAC 2E.0206 (App. 3). The health "services must be provided in keeping with the security regulations of the facility." 5 NCAC 2E.0205 (App. 3).

[18] "[T]he American Medical Association Standards for Health Services in Prisons (1979) . . . prescribe the relationship between medical personnel and other prison officials as one of 'close cooperation and coordination'; a joint effort.' Preface at i; Std. 102 & Discussion." J.A. 51-52.

[19] There are other important differences between a lawyer serving as a public defender and a doctor as a prison physician. The latter works inside the publicly owned and maintained prison hidden behind fences, walls and gates. He is working with and for the prison officials, and is accountable only to them. The public defender, by contrast, is constantly under the eye of an independent judiciary before whom he is regularly appearing. Unlike the prisoner, who can only complain to the State, his doctor's employer, the public defender's clients are free to complain to the courts about him and to seek his removal from the case. Such complaints and requests are often made and are regularly and seriously considered by the courts. When cause appears, new counsel is appointed. *See*, e.g. Rule 104, Iowa Rules of Appellate Procedure, in *Dodson*, 454 U.S. at 314 n. 2. No equivalent policing mechanism exists for prisoners dealings with prison doctors.

[20] The majority below also found support for its view in the *Dodson* Court's discussion of *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) and *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The *Dodson* opinion does point out that *O'Connor* involved claims against a psychiatrist who served as the superintendent at a State mental hospital, and that *Estelle* involved a physician who was the medical director of the Texas Department of Correction and also the chief medical officer of a prison hospital. However, *Estelle* did not turn on the supervisory role of the doctor there; the complaint was premised on the medical treatment given. *See Estelle*, 429 U.S. at 103, 104 n. 10 (citing with approval several court of appeals decisions upholding claims of delib-

As developed above, *Dodson* turns on the particular professional obligation of the criminal defense lawyer to be the adversary of the state, not some general, sweeping notion of professional independence and integrity applicable to all professionals. The idea that all professionals are removed from § 1983 purview when acting in their professional capacities conflicts directly with other decisions by the Court which identified professionals as state actors. For example, in *Parham* v. *J.R.*, 442 U.S. 584, 606-07 (1979), the Court held that the commitment of a juvenile to a state mental hospital by her parents or by the state involves state action entitling the child to procedural due process in the form of a professional evaluation of the child by a staff physician. In that circumstance the physician, acting within his professional capacity, acts for the state in providing the due process which is constitutionally required of the state. He is plainly a state actor acting under color of state law. cf. *Dennis* v. *Sparks*, 447 U.S. 24 (1980); *Tower* v. *Glover*, 467 U.S. 914 (1984) (state judge acts under color of law).

State action is also implicated in the decisions of a doctor at a state institution for the mentally retarded. In

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erate indifference without any mention of supervisory and custodial duties). *See also*, *Dodson*, 454 U.S. at 330-31, 331 n. 2 (Blackmun J., dissenting) (noting that claims in *Estelle* and *O'Connor* were unrelated to the custodial and supervisory functions of the doctors there). The doctors' custodial and supervisory functions were not at issue. "The *Polk [Dodson]* Court discussed the custodial and supervisory functions of the doctors in *Estelle* and *O'Connor* simply to highlight the cooperative relationship between the doctors and the state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state." J.A. 51. (Chief Judge Winter, dissenting). Moreover, as we show below, prison doctors in general and Dr. Atkins in this case perform such functions and act in concert with other supervisors and custodians.

Youngberg v. *Romeo*, 457 U.S. 307 (1982), the Court held that a patient at such an institution "retains [due process] liberty interests in safety and freedom from bodily restraint," although such interests are not absolute. *Id.* at 319-20. The doctor or other professional at such a state institution is liable for violating those constitutional rights "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. Thus the state is constitutionally obliged to exercise professional judgment in matters of patient restraint and safety. If the professional's decision is flawed, tested by the Court's standard, then he, acting for the state, is liable for the constitutional violation.

The Fourth Circuit's explicit drastic limitation on *Estelle*, J.A. 43-47, is inconsistent with *Dodson* and well established state action doctrine. As such, it should be rejected.

II

A PHYSICIAN, EMPLOYED UNDER A CONTRACT BY THE STATE TO PROVIDE REGULAR, SUBSTANTIAL BUT LESS THAN FULL TIME ORTHOPEDIC SERVICES AT A PRISON HOSPITAL AND TO BE ON CALL 24 HOURS EACH DAY FOR EMERGENCIES FOR WHICH HE RECEIVES BASE PAY OF MORE THAN $50,000 ANNUALLY AND ADDITIONAL FEES FOR EACH SURGERY, ACTS UNDER COLOR OF STATE LAW IN TREATING PRISONERS.

We have shown in part I above that a physician who is a permanent member of a state prison medical staff acts under color of law when he provides or withholds medical care to prisoners and is responsible to them under § 1983 if he should inflict cruel and unusual punishment. Thus

the broad doctrine advanced by the majority below which would remove professionals from § 1983 coverage is wrong. In this part we show that the Fourth Circuit's narrower holding in *Calvert* v. *Sharp*, 748 F.2d 861 (1984), alternatively applied to this case, J.A. 44, 47, is also wrong. Dr. Atkins acted under color of state law in his treatment of petitioner because he was in fact clothed with the authority of the state and because he acted in concert with other prison authorities in treating petitioner.

A. In Serving As Petitioner's Doctor, Dr. Atkins Acted Under The Authority Granted To Him By The State To Fulfill Its Constitutional Obligation To Provide Medical Care For Prisoners; His Action Was State Action.

The fact that Dr. Atkins' employment contract "did not require [him] . . . to work exclusively for the prison", J.A. 50 (dissent), does not make him any less of a prison official than if he performed those duties as a permanent member of the state prison medical staff. He worked regularly as a doctor at the prison hospital fully invested with State authority to fulfill essential aspects of the duty placed on the State by the Eighth Amendment "to provide medical care for those whom it is punishing by incarceration." *Estelle*, *supra*, 429 U.S. at 103. The Fourth Circuit acknowledges that the formal designation of the employment relationship does not determine whether Dr. Atkins acted under color of state law. "Liability for a constitutional violation arising from a wrong done to an inmate should not rest on the contractual arrangement entered into by the putative defendant with third parties." J.A. 47. "If an individual is possessed of state authority and purports to act under that authority, his action is state action." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964).

An examination of Dr. Atkins' position within the prison system's "total health care delivery system," *Manual* § 100.3 (App. 5-6), shows clearly that his action is state action rendering him amenable to suit under § 1983. To understand Dr. Atkins' duties under his contract, it is helpful to know something of the prison system's total health care system. The hospital, which is behind the prison walls at Central Prison in Raleigh, North Carolina, is the acute care facility for a prison population of about 17,500 inmates. Prisoners are transferred to Central Prison for hospitalization from throughout the system on the orders of medical staff at the local units. *Manual* at § 207 (App. 11-13).

Prisoners are also bused into Central Prison from outlying units for appointments at twelve specialty clinics; the Orthopedic Clinic is held on Tuesdays and Thursdays. *Id.* at § 208 (App. 14-15). The specialist conducting the clinic "[f]requently" schedules the inmate to be brought back to the clinic at some time in the future for further treatment or reevaluation. He indicates the date for return on the prisoner's health records and the local unit returns the prisoner to the clinic on that schedule. *Id.* at § 208.3 B (App. 15). It is the physicians who determine when inmates are to be transferred for medical reasons and the method of transportation. *Id.* at § 209 (App. 16).

Central Prison Hospital was a 97 bed acute care facility, staffed by one full-time doctor and other doctors employed on non-exclusive bases to conduct the twelve special clinics and care for the hospitalized prisoners.

Physicians write medical orders "instruct[ing] health care personnel to carry out a specific treatment or medical procedure on a given patient." *Id.* at § 204.4 (App. 10). Nurses, physician assistants, physical therapists, other

health care workers and prison personnel are subject to the physicians' orders. J.A. 24, 28.

Dr. Atkins played an important part in fulfilling North Carolina's obligations under *Estelle* to its total prison population. He was the orthopedist for the entire prison system and provided twice weekly Orthopedic Clinics prescribed by the Health Care Procedures Manual. J.A. 24; *Manual* at § 208 (App. 14-15). He performed the orthopedic surgery at Central Prison Hospital required for North Carolina prisoners. J.A. 24. He examined all orthopedic and neurological referrals. *Id.*[21] He made regular rounds at Central Prison Hospital on his post-operative and other orthopedic patients "as often as necessary to insure patient's [sic] progress to recovery." *Id.* He coordinated with the Physical Therapy Department, and ordered the physical "therapy necessary to restore function." *Id.* He was available "24 hours per day for emergency orthopedic evaluations or surgery." *Id.* His contract required him to furnish at least two days per week of his time in the performance of these duties. J.A. 25. The record does not show that Dr. Atkins conducted a private practice apart from his work at the prison.[22]

[21] He apparently saw neurological as well as orthopedic referrals because the system did not have a separate neurological clinic or regularly employ a neurosurgeon. *See Manual* at § 208 (App. 14-15).

[22] The record in this case, comprised of affidavits submitted by Dr. Atkins when he sought summary judgment, is silent on the question of Dr. Atkins' practice outside his state employment. Since the burden was on Atkins to demonstrate that he was entitled to judgment as a matter of law and since he was opposed by a *pro se* incarcerated plaintiff, all inferences arising from the record's silence concerning the amount of time Dr. Atkins devoted to his work at Central Prison Hospital or the amount of time he may have spent seeing private patients should be drawn against Atkins and in favor of petitioner. As we have noted above, Dr. Atkins testified in a deposition in another case in the same district court that he spent considerably more time on his prison work than on his private practice and that his income from his prison work tremendously exceeded that derived from his private practice. n. 1, *supra*. The court in *Davenport* v. *Saint Mary Hosp.*, 633 F. Supp. 1228 (E.D. Pa. 1986), refused to grant defendant's motions for summary judgment against a *pro se* litigant where all the facts material to a state action determination were not yet before the court.

For his work at Central Prison Hospital, Dr. Atkins was paid at the rate of $495 per clinic and additional fees, according to a schedule, for each surgery. J.A. 25. This translates to a base pay of $51,480 for providing two clinics for 52 weeks. The record does not reveal Dr. Atkins' additional prison earnings for his surgeries.[23]

The foregoing facts show Atkins is fully "clothed with the authority of state law," *United States* v. *Classic*, 313 U.S. 299, 326 (1941), to perform the State's *Estelle* duties. His work was regular, ongoing and substantial. He carried out his duties at the state prison within the prison hospital. North Carolina designated him to serve as the orthopedist for the 17,500 people incarcerated in its prisons. The state authorized him to issue orders to other medical and prison personnel to provide for the medical care of the prisoners in the clinics and the hospital. As in the petitioner's experience, those orders were followed. The state authorized him to issue orders to schedule prisoners for appointments at the orthopedic clinic and for admission to the hospital. Other prison personnel carried out his orders. "[W]hen the state gives a select individual

[23] At his deposition in the *Hammond* case, he testified that he received as much as $30,000 annually for his surgeries in addition to money he was paid for the orthopedic clinics.

. . . powers that are traditionally exercised by the state[24] and not possessed by the general citizenry, a person exercising these powers . . . may therefore be deemed a state

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[24] We emphasize in this part of our argument the governmental nature of Dr. Atkins' work to show that he was in reality a state official even though his employment agreement with the prison permitted him to practice medicine privately to the extent he had time to do so consistent with his contractual duties in the prison. Most of the same facts also provide the basis for a finding, which the dissenters made below, J.A. 52-54, that he acted under color of state law under "the public function" doctrine:

> Action "under color" of state law will be found if an otherwise private party performs a function that has been "traditionally the exclusive prerogative of the State." *Blum* v. *Yaretzky*, 457 U.S. 991, 1011 (1982). The incarceration of convicted criminals surely falls within that category. And because "[a]n inmate must rely on prison authorities to treat his medical needs . . . [it is] the *government's obligation* to provide medical care for those whom it is punishing by incarceration . . . '[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'" *Estelle*, 429 U.S. at 103-04 (emphasis added) (citations omitted).

J.A. 52.

Judge Winter emphasized that although medical care in general is not within the exclusive prerogative of the state, it is exclusive to the state "in the *prison context*, where the state has complete control over the circumstances and sources of a prisoner's medical treatment." J.A. 53. Other courts have also concluded that private doctors providing medical care to those the state has incarcerated perform a "public function" so as to be subject to § 1983 liability. *Ort* v. *Pinchback*, 786 F.2d 1105 (11th Cir. 1986); *Ancata* v. *Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985); *Davenport* v. *Saint Mary Hospital*, 633 F.Supp. 1228 (E.D.Pa. 1986); *Lombard* v. *Eunice Kennedy Shriver Center*, 556 F.Supp. 677 (D.Mass. 1983). Petitioner agrees with those views and submits that he is entitled to relief for those reasons. He has chosen to rely primarily on the related but simpler arguments that Dr. Atkins is a state official and contends that he acts in concert with other state officials since the facts seem so clearly to support state action under those less complicated doctrines.

actor." *Davenport* v. *Saint Mary Hosp.*, 633 F. Supp. 1228, 1237 (E.D. Pa. 1986).[25] In *Griffin* v. *Maryland*, 378 U.S. 130 (1964), a privately employed policeman who had been deputized by the state to exercise state police power acted for the state when he exercised those powers even though he was not an employee of the state and was not paid by the state.[26] Here Dr. Atkins was invested with important state powers, was hired by the state and paid

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[25] As in *Davenport*, the district court in *Lombard* v. *Eunice Kennedy Shriver Center*, 556 F. Supp 667, 680 (D.Mass. 1983) found state action where the state assigned state powers to a private entity and the private entity accepted those powers:

> Under the circumstances of this case, it would be empty formalism to treat the Shriver Center as anything but the equivalent of a governmental agency for the purposes of 42 U.S.C. § 1983. Whether a physician is directly on the state payroll, as in *O'Connor*, or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the Shriver Center, and because Shriver voluntarily assumed that obligation by contract, Shriver must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if Shriver were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.

[26] See also the several cases cited by the Court in *Davenport*, 633 F.Supp. at 1237:

> *Jennings* v. *Shuman*, 567 F.2d 1213, 1220 (3d Cir. 1977) (holding that a private citizen who was appointed an assistant special prosecutor was clothed with the authority of state law); *Kay* v. *Benson*, 472 F.Supp. 850, 851 (D.N.H. 1979) (finding that New Hampshire's civil commitment statute gave the defendant physician the power of detention, a power historically reserved to the state, thereby clothing him with state authority); *Hill* v. *Toll*, 320 F.Supp. 185, 186-87 (E.D.Pa. 1970) (holding that because a state statute accorded bail bondsmen the privilege to arrest, a privilege not given to the general public, the state had placed its imprimatur on their conduct.)

by the state. He acted under color of state law when he acted under the authority the state had given him.

Dr. Atkins' official status and authority at Central Prison is confirmed by the response of other prison authorities to Dr. Atkins' directions concerning petitioner. When Dr. Atkins placed an order in petitioner's medical files that petitioner was released from Atkins' care and would not be seen by him any more, J.A. 8, that order was obeyed. Physician assistants regularly scheduled petitioner for appointments with Dr. Atkins when petitioner complained to them about his pain. *Id.* Dr. Atkins did not keep the appointments. *Id.* Nurse Earp sought to schedule petitioner for treatment by Dr. Atkins of his badly swollen and painful leg, but when he discovered Atkins' order, he obeyed it. *Id.* Petitioner wrote letters to the Governor, the Director of Prisons and other prison officials seeking orthopedic care. Atkins' order was not disturbed. *Id.* Petitioner filed a formal grievance with the authorities. J.A. 9. They responded that petitioner had been scheduled to see Dr. Atkins on June 21, 1984. J.A. 9. That administrative determination was also overridden by Dr. Atkins' order: petitioner was neither taken to see Atkins on June 21, 1984, nor ever again. Atkins was invested with the state's power, which he exercised and abused, to withhold orthopedic treatment from petitioner entirely, treatment petitioner was completely dependent upon the state to provide.[27] Dr. Atkins was able to withhold needed medical treatment from petitioner only because the state gave him that power and other officials respected his power. He acted under color of law.

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[27] See note 16 *supra*.

B. Dr. Atkins Acted Under Color Of Law Because He Willfully Participated In Joint Action With Prison Officials In Withholding Medical Care From Petitioner.

The argument that Dr. Atkins was not a state actor because he was not a permanent member of the prison staff must be set aside, since the record plainly shows that he acted willfully with state officials in denying petitioner needed medical care. Probably the least controversial strand of state action doctrine is the rule that "private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Dennis* v. *Sparks*, 449 U.S. 24, 27-28 (1980); *Tower* v. *Glover*, 467 U.S. 914 (1984); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States* v. *Price*, 383 U.S. 787, 794 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725-726 (1961). *See also*, *Briley* v. *State of California*, 564 F.2d 849, 858 (9th Cir. 1977) (private physician who engaged in joint action with state officials and others to perform surgery on plaintiff resulting in the infliction of cruel and unusual punishment acted under color of state law).

We have detailed in the preceding section, II A., how Dr. Atkins acted together with a host of prison officials to withhold needed medical care from petitioner. This joint denial of medical care occurred from the last time Dr. Atkins saw petitioner on February 15, 1984, when he told petitioner that he would have to follow petitioner regularly because the injury had not healed and surgery might be needed, until at least June 28, 1984 when petitioner was transferred to Odom Prison. The various physician assistants, Nurse Earp, and other prison authorities including the grievance representatives recognized petitioner's need for orthopedic care and sched-

uled appointments for petitioner with Dr. Atkins. When the appointed day and hour would arrive, those responsible for taking him to Dr. Atkins' clinic would never come for him. They cooperated with and acquiesced in Dr. Atkins' order that he would not see petitioner. Moreover, by not otherwise arranging for orthopedic care the prison authorities knew petitioner needed, they tacitly carried out Atkins' course of deliberate indifference.

It is true that the record before the district court on Dr. Atkins' motion for summary judgment does not show particular agreements between prison authorities and Dr. Atkins or particular actions by them in withholding orthopedic care from petitioner. It is known, however, that Dr. Atkins worked as an integral part of a "total health care delivery system", Manual § 100.3 (App. 5-6), that "[t]he provision of health care [in the North Carolina prison system] is a joint effort of correctional administrators and health care providers", *Id.* § 100.5 (App. 7), that as a physician within the system, Dr. Atkins is granted the power to issue orders "instruct[ing] health care personnel to carry out a specific treatment or medical procedure on a given patient," *id.* at § 204.4 (App. 10), and that the period when medical care was being withheld as described above extended over four months. In these circumstances, Dr. Atkins' submissions on his motion for summary judgment were inadequate to defeat petitioner's claim that Dr. Atkins was jointly engaged with state authorities and therefore amenable to suit under § 1983. The circumstantial evidence of understandings and agreements between the public authorities and the allegedly private defendant is more complete here than it was in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144. There the Court said: "As the moving party, respondent had the burden of showing the absence of a genuine issue as to any

material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." 398 U.S. 144, 157. The Court further stated that summary judgment should not have been granted in that case because "[r]espondent here did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served." *Id.* Here Dr. Atkins did not even attempt to refute petitioner's claim that Dr. Atkins "reached an understanding with some [prison] employee that petitioner not be [afforded medical care]." Thus Dr. Atkins' motion for summary judgment should have been denied.

Finally, Dr. Atkins and the prison authorities function in a "symbiotic relationship" which enables the prison medical department "to carry out its primary public purpose . . .,"[28] to provide medical care to its prisoners. He works with them in "a joint effort". Manual § 100.5 (App. 7). As we have seen, the state has "so far insinuated itself into a position of interdependence with [Dr. Atkins] that it must be recognized as a joint participant in the challenged activity . . . ." *Burton* v. *Wilmington Parking Authority*, 365 U.S. at 725. The state depended on Dr. Atkins to fulfill the state's obligation under the Eighth Amendment and under state law to provide orthopedic care to its prisoners as needed; Dr. Atkins depended upon the state for virtually all of his livelihood. Dr. Atkins and the state were joint participants in providing medical care to inmates

[28] *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 175 (1972), describing the relationship between the lessee restaurant and the parking authority in *Burton* v. *Wilmington Parking Authority, supra.*

and in withholding medical care from petitioner.

CONCLUSION

The judgment of the court of appeals should be reversed with instructions that the district court's grant of summary judgment in favor of respondent Atkins be vacated and the case remanded to the district court.

Respectfully, submitted

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APPENDIX

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 5—DEPARTMENT OF CORRECTION

CHAPTER 2—DIVISION OF PRISONS

SUBCHAPTER 2A—
ORGANIZATION AND PERSONAL CONDUCT

DATE ISSUED: JULY 1987.

.0201 Statutory Responsibility

G.S. 148-19, Health Services, specifies that the Department of Correction shall provide health services to prisoners which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis for all types of patients. In compliance with the statue, the Director, Division of Prisons is charged with the responsibility to provide each inmate the medical, dental, and mental health services necessary to maintain basic health.

History Note: Statutory Authority G.S. 148-11; 148-19
Effective February 1, 1976
Amended Effective September 23, 1980.

.0202 Facility Responsibility

The delivery of health services at each facility is the responsibility of the warden, institution head, or superintendent of that facility. The warden, institution head, or unit superintendent will designate in writing a specific health authority who is charged with the responsibility to provide health services to that facility. The health authority may be a physician, a physician extender, or a health administrator. He may be a full time employee or a contractual services provider. The responsibility of the health authority includes arranging for all levels of health care and assuring quality of and inmate access to all health services. The duties of the health authority will be included in a written agreement, contract, or job description.

History Note: Statutory Authority G.S. 148-11; G.S. 148-19;
Effective February 1, 1978
Amended Effective September 23, 1980.

.0203 Staff Responsibility

The Director of the Division of Prisons shall have on his staff a Chief of Health Services who will be responsible to plan, organize, and coordinate a total health delivery system which includes medical, mental, and dental health services for all

inmates within the North Carolina Division of Prisons. The Chief of Health Services will be responsible to develop and maintain in a current state a health care procedures manual which will implement the health care policies of the Division of Prisons.

History Note: Statutory Authority G.S. 148-11; 148-19
Effective February 1, 1976
Amended Effective September 23, 1980.

.0204 Clinical Responsibility

Matters of medical, dental, and mental health involving clinical judgment are the sole province of the responsible physician, dentist, psychiatrist, or qualified psychologist respectively. However, these services must be provided in keeping with the security regulations of the facility.

History Note: Statutory Authority G.S. 148-11, 148-19
Effective February 1, 1976
Amended Effective September 23, 1980.

.0205 Meetings And Reports

The warden, institution head, or unit superintendent of each facility will meet with the responsible health authority for his facility at least quarterly. It will be the responsibility of the health authority to report to the warden, institution head, or unit superintendent on matters dealing with the delivery of health services. The report should include such topics as the effectiveness of the health care system for that facility, description of any health environment factors which need improvement, changes effected since the last reporting period, and, if appropriate, recommendations for corrective action. A copy of this report will be provided to the Chief of Health Services. The responsible health authority will also submit an annual statistical summary in compliance with procedures developed by the Chief of Health Services.

History Note: Statutory Authority G.S. 148-11; 148-19
Effective September 23, 1980.

.0206 Annual Review

Each health care policy and procedure will be reviewed at least annually by the responsible health authority at each facility and by the Chief of Health Services. The policy and procedures document will bear the date of the most recent review or revision and the signature of the reviewer.

History Note: Statutory Authority G.S. 148-11; 148-19
Effective September 23, 1980.

NORTH CAROLINA

DIVISION OF PRISONS

HEALTH CARE PROCEDURE MANUAL

These procedures implement the Health Care Policy established by Section 5NCAC 2E .0200 of the North Carolina Division of Prisons Policy and Procedures Manual.

Recommendations for changes, additions, or deletions should be submitted through channels to the Chief of Health Services for appropriate action.

/s/ Ralph D. Edwards, Director
RALPH D. EDWARDS, DIRECTOR
N. C. Division of Prisons

DATE ISSUED: MAY 1, 1980

This project was supported by a Law Enforcement Assistance Administration Grant awarded by the Governor's Crime Commission, North Carolina Department of Crime Control and Public Safety pursuant to the Omnibus Crime Control and Safe Streets Act of 1968 as amended.

OVERALL RESPONSIBILITIES

100.1 Division Responsibility

The Director, Division of Prisons, is charged with the responsibility to provide each inmate the medical, dental, and mental health services necessary to maintain his basic health.

100.2 Facility Responsibility

The delivery of health services at each facility is the responsibility of the warden, institution head, or superintendent of that facility. The warden, institution head, or unit superintendent will designate, in writing, a specific individual with the responsibility for providing health services to his facility. This individual may be a health administrator, a physician, or a physician extender. He may be a full time employee or a contractual service provider. If the designated individual is other than a physician, a physician will also be identified who will be responsible for clinical judgments. The duties of the responsible health authority will be specified in a written agreement, contract, or job description.

100.3 Staff Responsibility

The Director, Division of Prisons, shall have on his staff a Chief of Health Services whose job it will be to plan, organize, and coordinate a total health delivery system which includes medical, mental, and dental health services for all inmates incarcerated within the North Carolina Division of Prisons. He will have staff responsibility to:

A. Develop and maintain a medical plan in a current state,

B. Make Recommendations for health care staffing for each facility,

C. Assist in recruiting health care personnel and participate in the selection process of key providers,

D. In coordination with institution heads and unit superintendents, determine medical equipment requirements and execute staff responsibility to assist in the procurement of equipment,

E. Make recommendations for facility design to allow for the delivery of health services,

F. Prepare a Division training program for all health professionals within the system,

G. Execute staff responsibility for the preparation of the Health Services budget,

H. Coordinate with other state agencies to facilitate continuity of care and to acquire services wherever possible that are not available within the Division of Prisons,

I. Execute contractual arrangements with health providers as appropriate,

J. Prepare federal grant requests to acquire additional resources for health delivery whenever appropriate,

K. Conduct staff visits to institutions and field units and make recommendations to the responsible officials for improvements in service delivery,

L. Recommend to the Director, Division of Prisons, policies and/or procedures which specifically address the delivery of health services,

M. Prepare and submit to the Director, Division of Prisons, an annual report of health services for the preceding year.

100.4 Consultants

Individuals trained in the following disciplines will be appointed in writing by the Director, Division of Prisons, to serve as consultants to the Chief of Health Services:

A. Physician as Chief Clinical Director,

B. Psychiatrist,

C. Dentist,

D. Clinical Psychologist,

E. Physician Extender,

F. Registered Nurse,

G. Registered Records Administrator,

H. Radiologist or Certified Radiology Technician,

I. Pharmacist,

J. Diet Therapist,

K. Medical Technologist or Certified Laboratory Technician.

100.5 Matters of Clinical Judgment

The provision of health care is a joint effort of correctional administrators and health care providers, and can be achieved only through mutual trust and cooperation. Matters of medical, dental, and mental health treatment involving clinical judgments are the sole province of the responsible physician, dentist, psychiatrist, or qualified psychologist respectively. However, these services must be provided in keeping with the security regulations of the facility.

INITIAL SCREENING

200.1 General

To insure continuity of care, intake screening shall be performed by trained staff on all inmates including transfers immediately upon arrival at the facility and before placement in the general population or housing unit. The findings of this screening shall be recorded on the Form DC-435.

200.2 Screening

Screening shall include at least the following items:

A. Inquiry as to whether or not they presently are being treated for a health problem, if they are presently on medication, if their medication accompanied the transfer, or if they have any health complaints at the time of receipt at the unit.

B. Observation of the inmate's behavior, general appearance, conduct, any obvious mental disorders, state of consciousness, evidence of any physical deformities, physical abuse or trauma.

C. Designate on the Form DC-435 what disposition was made of the inmate immediately after the screening process. Disposition can include housing with the general population, housing with the general population and a health provider notified, or a referral to an appropriate health provider on an emergency basis.

200.3 Training

The responsible health authority for the facility will insure that the screening officers designed by the unit superintendent are trained in the health screening process.

200.4 Disposition

The Form DC-435 will be filed in the Outpatient Health Record upon completion of the initial screening process.

204.1 General

Treatment by health care personnel other than a physician, dentist, or other independent provider (such as an optometrist or a podiatrist) must be performed pursuant to written, standing, or direct orders. Physician Assistants and Nurse Practitioners may practice within the limits of state law and regulations promulgated by the North Carolina Board of Medical Examiners.

204.2 Standing Orders

Standing medical orders must be approved and signed by the responsible physician or other personnel authorized by law to write medical orders. They are directives for health professionals to provide definitive treatment of identified conditions and for on site emergency treatment. Each order will contain at least the condition, treatment, and referral data is applicable. Standing orders will be a mutual agreement between local unit nursing personnel and the unit physician.

204.3 Sample Set of Standing Orders

A recommended set of standing orders is indicated below. Each unit physician should review these standing orders and change them according to his treatment preference. The resulting orders must then be signed by the applicable physician and made available to the health care staff.

ABRASIONS AND SUPERFICIAL LACERATIONS:
Clean with Betadine (Providone-iodine) or Phisohex Solution
Mycitracin Ointment (Triple Antibiotic Ointment)
Sterile Dressing
0.5cc Tetanus Toxoid IM if not received within the past 12 months
Other: _____

BURNS, FIRST AND SECOND DEGREE:
Clean with Betadine (providone-iodine) and iced water as tolerated X 20 minutes
Silvadene Ointment, fluff dressing
Refer to Physician Extender or M.D.
Other: _____

BURNS, THIRD DEGREE:
As above
Call Physician Extender or M.D.
Other: _____

DYSPEPSIA:
Antacid liquid or tablets, i.e. Maalox, Mylanta, etc.
Other: _____

DIARRHEA:
Kaopectate 30cc qid X 2 days
Liquid diet
Other: _____

SEVERE ABDOMINAL PAIN WITH FEVER:
Refer to Physician Extender or M.D.
Other: _____

CONSTIPATION:
Milk of Magnesia 30 cc po stat
Other: _____

**PHYSICIAN EXTENDER: Physician Assistant, Family Nurse Practitioner

Physician Signature

Physician Extender Signature (if applicable)

204.4 Direct Orders

A direct order is a signed order by the responsible physician, or other personnel authorized by law or regulation to write medical orders, written in the individual health record. This order instructs health care personnel to carry out a specific treatment or medical procedure on a given patient.

204.5 Protocols

For the purpose of these procedures, protocols apply only to Physician Extenders. A protocol is a more formal method of analyzing and dealing with a symptom complex or disease process. Protocols allow for more flexibility of treatment and are utilized as standing orders between a physician and physician assistant or nurse practitioner. All protocols must be registered with and approved by the North Carolina Board of Medical Examiners. A suggested approved text that may be used is "Patient Care Guidelines for Family Nurse Practitioners" by Hoole, Greenberg, and Pickard. Little, Brown & Co., Boston, Massachusetts.

207.1 General

Female offenders and male offenders 17 years old and younger will be provided hospitalization in local community hospitals as determined by the attending physician. These procedures pertain to male inmates who are 18 years old or older. The condition of the patient as determined by attending physician shall be the criteria as to whether an inmate is hospitalized locally or is transferred to Central Prison Hospital for hospitalization.

207.2 Local Hospitalization

Whenever an inmate is hospitalized in a facility outside the Division of Prisons, the following information will be reported by telephone to the Health Services Office on the

first workday following the day hospitalization commenced:

A. Inmate's name and number

B. Unit

C. Name of hospital

D. Admission diagnosis

E. Name of physician

F. Date of hospitalization

This information is communicated by the Office of the Chief of Health Services to Central Prison Hospital so that the medical staff can communicate with the attending physician in the community hospital to arrange for his transfer to Central Prison Hospital as soon as medically permissible. When it is decided that the patient can be transferred to Central Prison, the means of transportation, i.e., ambulance, van, etc., will be as determined by the attending physician. Every effort will be made to obtain a discharge summary or record of treatment from the discharging hospital. That record will accompany the patient to Central Prison Hospital.

207.3 Central Prison Hospitalization

1. Routine Admissions. When it is determined that an inmate has a condition requiring hospitalization that can be accommodated at Central Prison on a scheduled basis, clearance for this action will be achieved by calling Central Prison (919/828-2361 X 276, 277, 278, or 279). A Form DC-164 must be completed, signed by the unit physician or physician extender, and accompany the patient to Central Prison. Special care will be taken to insure that information indicating treatment rendered at the unit and current medication is shown on the DC-164. Normally, this type of patient will be transported by prison bus on Tuesdays or Thursdays. The Outpatient Health Record must be forwarded with the Form DC-164.

2. Emergency Admissions. Inmates requiring emergency treatment will be accepted at Central Prison

Hospital at any time of the day or night. Emergency referrals may be requested by the unit nurse, custodial personnel, or the unit physician. The following information must be provided by telephone at the time of referral to insure that appropriate speciality care is available:

A. Name of person calling and unit

B. Patient's name and number

C. Patient's status (safekeeper, PSD, felon, misdemeanant)

D. Ambulatory or stretcher case

E. Diagnosis and current medication, if any

F. Estimated time of arrival.

3. Mental Health Referrals. Inmates scheduled for hospitalization for mental health reasons will be referred as provided in paragraph 402.3 of these procedures.

207.4 Specialty Hospitalization

Whenever an inmate has a condition requiring treatment beyond the capability of Central Prison Hospital, appropriate arrangement will be made with community hospitals to acquire necessary care. Central Prison Hospital's health care manual will include specific instructions as to how these arrangements will be made. The decision as to the requirement for specialty hospitalization will be a clinical decision made by the attending physician.

Specialty hospitalization for male inmates seventeen (17) years old and younger will be arranged for by the contractual physician serving Western Correctional Center. Specialty hospitalization for female offenders will be arranged for by the contractual physician serving the North Carolina Correctional Center for Women. Specific procedures as to accomplishing these arrangements will be included in the health care manual for each of the above mentioned facilities.

208.1 General

When the attending physician determines that the patient has a condition which requires treatment by a specialist, such treatment must be made available.

208.2 Local Resources

Specialty care for male inmates 17 years old and younger and for female offenders will be acquired through the use of local specialty clinics or by arranging for the specialist to come into the facility to hold clinics. The physician extender, in coordination with the contractual physician, will determine the most efficient method to acquire specialty care for Western Correctional Center and Correctional Center for Women. If the patient is male, 18 years old or older, a determination will be made by the referring physician as to whether the condition is of such an emergency nature that the services of a local specialist are required. If such is the case, treatment will be obtained in the local community. If the condition of the patient is such that he can be transported to Central Prison Hospital for this care, arrangements will be made for him to be seen at the appropriate specialty clinic at Central Prison Hospital.

208.3 Central Prison Hospital Specialty Clinics

A. Clinic Schedules

Inmates scheduled for treatment by the following specialty clinics should be transferred on the days indicated:

1. Medical - Tuesday or Thursday
2. Surgical - Tuesday or Thursday
3. Mental Health - Tuesday or Thursday
4. Dental - Tuesday or Thursday
5. Eye - Tuesday
6. Neurology - Tuesday
7. Ear, Nose & Throat - Thursday
8. Orthopedics - Tuesday or Thursday
9. Urology - Tuesday or Thursday
10. Endodontics - Tuesday
11. Dermatology - Tuesday

12. Oral Surgery - Tuesday or Thursday

Care must be taken to conform to the above schedule to preclude an unnecessary waiting period at Central Prison and the inefficient use of bed space at that facility. A completed form DC-164 must be placed in the inmate's Outpatient Health Record which must accompany the patient.

208.3 B. Call Backs

Frequently after an inmate has been in a clinic or following hospitalization, the attending physician wants him to return for re-evaluation. The inmate's Outpatient Health Record or discharge summary will show when his presence is required and a memorandum will be forwarded to his unit reaffirming or changing his appointment. Adhere to the scheduled return dates since the inmate is placed on the schedule indicated in his record.

209.1 Medical Decision

The method of transporting an ill or injured patient is a medical decision.

209.2 Procedure

When the attending physician or his designated health professional determines that an emergency medical vehicle or an ambulance is necessary to transport an ill or injured inmate, such transportation will be made available. Each unit will include within their written medical procedures the actions necessary to acquire emergency medical or ambulance services. The number of accompanying security personnel will be determined by the officer in charge.

OBTAINING HEALTH SERVICE OUTSIDE OF THE DIVISION OF PRISONS

710.1 General

There are cases when an inmate wishes to obtain health services from sources outside the Division of Prisons at his

own expense or paid for from family funds or private health insurance resources. There are also instances when it is appropriate to acquire health services from the Veterans Administration or specific services funded by Vocational Rehabilitation by extending the limits of the place of confinement.

710.2 Own Expense

To acquire medical services at an inmate's own expense, the following conditions must be met:

A. The applicant must be in minimum custody. These procedures do not apply to inmates in maximum, close, or medium custody levels.

B. The unit physician must determine that the applicant is in need of the requested treatment.

C. The applicant will provide a statement indicating the type of service requested and the source of funds. The clinician who will provide the services must indicate to the unit superintendent the approximate cost and certify that the Division of Prisons is excused from any liability incurred as a result to the treatment.

D. The unit superintendent will ascertain that the inmate has sufficient funds available and that there are no custody risks involved in obtaining these services outside the Division of Prisons.

E. Minimum custody inmates who have been admitted as inpatients to a Division of Prisons inpatient facility will be allowed to acquire outside medical services at their own expense only if so referred by their attending physician.

710.3 Application

Applications will be submitted on form DC-397 to the unit superintendent who will forward such application to the Chief of Health Services recommending approval or disapproval of each request. Upon completion of action by the Chief of Health Services, one copy of the DC-397 will be returned to the unit and one copy will be retained in the Health Services Section.

Requests for outside dental care and special eyeglasses at an inmate's own expense are exceptions to the above policy. Such requests may be approved or disapproved by the unit superintendent without processing a form DC-397. In these cases, the unit superintendent must be assured that there is no custody risk involved and that the provider of the services will not hold the Division of Prisons liable for any costs incurred.

710.4 Extend Limits of Confinement

Under the provisions of G.S. 148-4, the Secretary of Correction of his designee may extend the limits of confinement of an inmate to acquire medical services not otherwise available. There are occasions when it is appropriate for an inmate to receive medical services from the Veterans Administration, Vocational Rehabilitation, or from a specific hospital funded by his own resources or personal health insurance. In these cases the inmate must request such services and the unit physician must determine that the applicant is in need of such services. The unit superintendent will determine that the Veterans Hospital, Vocational Rehabilitation facility, or community hospital will provide services as requested by the inmate. The unit superintendent will request approval to utilize these outside resources from the Chief of Health Services. Upon approval by the Chief of Health Services, the unit superintendent may request extention of the limits of confinement to allow for the provision of such services. Extension of the limits of confinement must be approved by an area administrator, institution head, or his designee. Limits of confinement will not be extended beyond the geographic boundaries of the State of North Carolina for the purpose of receiving medical services.

§ 148-19. Health services.

(a) The general policies, rules and regulations of the Department of Correction shall prescribe standards for health services to prisoners, which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis, for all types of patients. A prisoner may be taken, when necessary, to a medical facility outside the State prison system. The Department of Correction shall seek the cooperation of public and private agencies, institutions, officials and individuals in the development of adequate health services to prisoners.

(b) Upon request of the Secretary of Correction, the Secretary of Human Resources may detail personnel employed by the Department of Human Resources to the Department of Correction for the purpose of supervising and furnishing medical, psychiatric, psychological, dental, and other technical and scientific services to the Department of Correction. The compensation, allowances, and expenses of the personnel detailed under this section may be paid from applicable appropriations to the Department of Human Resources and reimbursed from applicable appropriations to the Department of Correction. The Secretary of Correction may make similar arrangements with any other agency of State government able and willing to aid the Department of Correction to meet the needs of prisoners for health services.

(c) Each prisoner committed to the State Department of Correction shall receive a physical and mental examination by a health care professional authorized by the Board of Medical Examiners to perform such examinations as soon as practicable after admission and before being assigned to work. The prisoner's work and other assignments shall be made with due regard for the prisoner's physical and mental condition.

(d) The Commission for Mental Health, Mental Retardation and Substance Abuse Services shall prescribe standards for the delivery of mental health services to inmates in the custody of the Department of Correction. The Commission for

Mental health, Mental Retardation and Substance Abuse Services shall give the Secretary of Correction an opportunity to review and comment on proposed standards prior to promulgation of such standards; however, final authority to determine such standards remains with the Commission. The Secretary of the Department of Human Resources shall designate an agency or agencies within the Department of Human Resources to monitor the implementation of such standards by the Department of Correction. The Secretary of Human Resources shall send a written report on the progress which the Department of Correction has made on the implementation of such standards to the Governor, the Lieutenant Governor, and the Speaker of the House. Such reports shall be made on an annual basis beginning January 1, 1978. (1917, c. 286, s. 22; C.S., s. 7727; 1925, c. 163; 1933, c. 172, s. 18; 1957, c.349, s. 10; 1967, c. 996, s. 4; 1973, c. 476, s. 133; c. 1262, s. 10; 1977, c. 332; c. 679, s. 7; 1981, c. 51, s. 6; c. 707, ss. 1, 2.)

QUESTIONS PRESENTED

I.

DO PRISON PHYSICIANS - WHETHER PERMANENT MEMBERS OF A STATE PRISON MEDICAL STAFF, OR UNDER CONTRACT WITH THE STATE PRISON SYSTEM - ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF § 1983 LIABILITY IN THEIR TREATMENT OF STATE PRISON INMATES?

II.

DID A PHYSICIAN WHO WAS UNDER CONTRACT TO PROVIDE ORTHOPEDIC SERVICES TO INMATES AT A STATE PRISON HOSPITAL ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF § 1983 IN HIS TREATMENT OF A NORTH CAROLINA STATE PRISON INMATE?

PARTIES

The parties to the proceedings below were the petitioner Quincy West, an inmate in the custody of the North Carolina Department of Correction, and defendants Samuel Atkins, Rae McNamara and James B. Hunt. Samuel Atkins was a physician acting under contract to the North Carolina Department of Correction to provide orthopedic services at North Carolina Central Prison Hospital at Raleigh, North Carolina; Rae McNamara was the former Director of the Division of Prisons of the North Carolina Department of Correction, and James B. Hunt was the former Governor of the State of North Carolina.

The District Court dismissed the claims against defendants McNamara and Hunt as frivolous and the Fourth Circuit Court of Appeals dismissed the plaintiff's interlocutory appeal of that Order on April 23, 1985. On September 3, 1986, a panel of the Fourth Circuit affirmed the dismissal of Defendant Hunt, but vacated the dismissal of Defendants Atkins and McNamara.

In its ***en banc*** decision, the Fourth Circuit reaffirmed the District Court's dismissals of Defendants Atkins, McNamara and Hunt. Petitioner West does not challenge the dismissals of Defendants McNamara and Hunt, and thus Defendant Samuel Atkins, a physician formerly under contract to provide orthopedic services at North Carolina Central Prison Hospital, is the only respondent in the Petition for Certiorari.

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STATUTES PRESENTED

CONSTITUTIONAL PROVISIONS INVOLVED

NO. 87-5096

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

QUINCY WEST,
Petitioner,

v.

SAMUEL ATKINS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

In an ***en banc*** opinion filed April 9, 1987 reported at 815 F.2d 993 (4th Cir. 1987), the Fourth Circuit Court of Appeals dismissed the Petitioner's Complaint filed pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, against Samuel Atkins, a physician formerly under contract to provide two orthopedic clinics a week at North Carolina Central Prison Hospital; Rae McNamara, former Director of the Division of Prisons of the North Carolina Department of Correction; and James B. Hunt, former Governor of the State of North Carolina. A copy of the ***en banc*** decision reprinted in the Joint Appendix 43-57 (hereinafter cited as "J.A.").

The September 3, 1986 panel opinion of the Fourth Circuit Court of Appeals is reported at 799 F.2d 923 (4th Cir. 1986).

The panel affirmed the dismissal of Defendant Hunt, but vacated the dismissals of Defendants Atkins and McNamara. On November 12, 1986, the Fourth Circuit Court of Appeals ordered that the decision of the panel be vacated and set the case for oral argument before the ***en banc*** court. J.A. 42.

The June 7, 1985 Order of the United States District Court for the Eastern District of North Carolina dismissing the claims against Defendants Atkins, McNamara and Hunt is not reported and is reprinted in the Joint Appendix 37-38.

From the ***en banc*** opinion of the Fourth Circuit Court of Appeals, West has filed this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari was filed on July 8, 1987, and granted on October 19, 1987.

STATUTE INVOLVED

The case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, or regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE AND FACTS

Inmate West tore the Achilles tendon in his left leg above his heel string while playing volleyball on July 30, 1983, at the Odom Correctional Center at Jackson, North Carolina. He was examined by Dr. John H. Stanley, who was under contract to provide medical care to inmates at the Odom Correctional Center, and who directed that West be transferred for orthopedic consultation to Central Prison Hospital at Raleigh, North Carolina.[1]

After his transfer on August 9, 1983, Dr. Samuel Atkins, a private physician on contract to provide two orthopedic clinics per week at North Carolina Central Prison Hospital at Raleigh, North Carolina, [J.A. 22-29][2] examined West and concluded that surgery could be avoided if the tendon would grow back together by itself. Atkins therefore placed West's leg in a long-

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1 West has attached as an appendix to his brief the Health Care Policy established by Section 5 N.C.A.C. 2E.0200 of the North Carolina Division of Prisons Policy and Procedures Manual. Section 208.2. [Petitioner's Appendix 14] of the North Carolina Division of Prisons Policy and Procedures Manual entitled "Local Resources" provides, ***inter alia***, as follows:

> ...If the patient is male, 18 years old or older, a determination will be made by the referring physician as to whether the condition is of such an emergency nature that the services of a local specialist are required. If such is the case, treatment will be obtained in the local community. If the condition of the patient is such that he can be transported to Central Prison Hospital for this care, arrangements will be made for him to be seen at the appropriate speciality clinic at Central Prison Hospital.

2 Section 208.3 [Petitioner's Appendix 14], promulgated pursuant to 5 N.C.A.C.2E.200 is entitled "Central Prison Hospital Specialty Clinics" and provides that inmates scheduled for treatment in the following specialty clinics should be transferred on the days indicated:

leg cast and gave orders that West should return on August 30, 1983. When West returned on August 30, 1983, the cast had been broken above the ankle and the top half was missing. The remaining cast was removed and a new long-leg cast applied. Orders were again given for West's return to Central Prison Hospital in three weeks. The cast was removed on September 20, 1983, and orders were given for West to return in two week. He was seen again by Dr. Atkins on October 4, 1983, and again on October 18, 1983. West next returned to the Orthopedic Clinic at Central Prison Hospital on January 12, 1984, and was discharged by Dr. Atkins on February 14, 1984. West injured his right leg while playing basketball on April 30, 1984. On November 29, 1984, West filed a Pro Se complaint pursuant to 42 U.S.C. § 1983 against Dr. Atkins; James B. Hunt, Governor of the State of North Carolina; and Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Correction. In the complaint West alleged that Dr. Atkins

> ... through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for badly torn Achilles tendon ...[J.A. 4]

As a result, West sought $1,000,000.00 in compensatory and $500,000.00 in punitive damages from Dr. Atkins; $640,000.00 in compensatory and $360,000.00 in punitive damages from Director McNamara; and a declaratory judgment against Governor Hunt. The District Court made a determination of frivolity under 28 U.S.C. § 1915(d) and dismissed the claims against Hunt and McNamara, and the Fourth Circuit

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(Fn. 2 continued from page 3.)

1. Medical - Tuesday or Thursday
2. Surgical - Tuesday or Thursday
3. Mental Health - Tuesday or Thursday
4. Dental - Tuesday or Thursday
5. Eye - Tuesday
6. Neurology - Tuesday
7. Ear, Nose and Throat - Thursday
8. Orthopedics - Tuesday or Thursday
9. Urology - Tuesday or Thursday
10. Endodontics - Tuesday
11. Dermatology - Tuesday
12. Oral Surgery - Tuesday or Thursday

Court of Appeals dismissed West's interlocutory appeal from that Order on April 3, 1985. ***WEST v. ATKINS***, 760 F.2d 266 (4th Cir., April 3, 1985) (No. 85 6092) [Unpublished]. [J.A. 12]

On June 7, 1985, citing ***CALVERT v. SHARP***, 748 F.2d 861 (4th Cir. 1984), ***cert. denied,*** 471 U.S. 1132 (1985), for the proposition that Dr. Atkins was not acting under color of state law for the purposes of § 1983, the District Court allowed Dr. Atkins' Motion for Summary Judgment and dismissed West's complaint. [J.A. 37-38]. Petitioner filed Notice of Appeal to the Fourth Circuit on June 17, 1985; and on September 3, 1986, a panel of the Court held that a determination of whether Dr. Atkins was deliberately indifferent to West's serious medical needs should have been made before addressing the issue of whether Dr. Atkins was acting under color of state law for the purposes of § 1983. The grant of Summary Judgment to Dr. Atkins and Director McNamara's dismissal under the determination of frivolity under 28 U.S.C. § 1915(d) was vacated and the case remanded to the District Court. [J.A. 39-41].

On November 12, 1986, the Court ordered that the decision of the panel be vacated and the case set for oral argument before the ***en banc*** court. [J.A. 42]. On April 9, 1987 the ***en banc*** court perceived no valid reason to overrule or distinguish ***CALVERT v. SHARP, supra,*** and in reliance on ***POLK COUNTY v. DODSON,*** 454 U.S. 312 (1981), dismissed West's claims holding that Dr. Atkins was not acting under color of state law for purposes of § 1983. [J.A. 43-57]. From this decision, Petitioner West sought a Writ of Certiorari from this Court. The Petition was granted on October 19, 1987. [J.A. 58]

SUMMARY OF ARGUMENT

In this case, the Fourth Circuit Court of Appeals ***en banc*** properly affirmed the District Court's dismissal of Inmate West's § 1983 action against Dr. Samuel Atkins, a private physician under contract to provide two orthopedic clinics a week at North Carolina Central Prison Hospital. The Court relied on its holding in ***CALVERT v. SHARP***, 748 F. 2d 861 (4th Cir. 1984), ***cert. denied***, 471 U.S. 1132, 105 S.Ct. 2667, 86 L.Ed.2d 283 (1985) in which it had previously stated that "[t]he professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical services to an inmate." The ***en banc*** opinion in ***WEST v. ATKINS*** and and the opinion in ***CALVERT v. SHARP, supra***, are both correctly decided based upon this Court's opinion in ***POLK COUNTY v. DODSON***, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), which held that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in ***DODSON***, the professional is a full-time employee of the state. In this case Dr. Atkins was not acting under color of state law when treating Inmate West in the orthopedic clinic at Central Prison Hospital and West's § 1983 action against Dr. Atkins was properly dismissed.

Even if the district court had jurisdiction over Dr. Atkins, which it did not, West failed to state an Eighth Amendment claim under ***ESTELLE v. GAMBLE***, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) - especially in light of ***WHITLEY v. ALBERS***, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

West's complaint, at best, sets forth a negligence based claim against Dr. Atkins and negligence is not actionable under § 1983. ***DAVIDSON v. CANNON***, 474 U.S. 898, 106 S.Ct.

668, 88 L.Ed.2d 677 (1986); ***DANIELS v. WILLIAMS***, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

ARGUMENT

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA DID NOT ERR WHEN IT DISMISSED WEST'S COMPLAINT FILED PURSUANT TO 42 U.S.C. § 1983 UPON A FINDING THAT IT LACKED JURISDICTION OVER THE SUBJECT MATTER BECAUSE DR. ATKINS DID NOT ACT UNDER COLOR OF STATE LAW WHEN HE TREATED WEST.

I.

LACK OF FEDERAL COURT JURISDICTION

Inmate West tore the Achilles tendon in his left leg while playing volleyball on July 30, 1983. West was transferred to Central Prison Hospital and Dr. Atkins, an orthopedic surgeon who maintains a private practice at Raleigh, North Carolina, and was under contract to conduct two orthopedic clinics per week at North Carolina Central Prison Hospital at Raleigh [J.A. 22-29], examined West for the first time on August 9, 1983, and concluded that surgery could be avoided if the tendon would grow back by itself. Dr. Atkins therefore placed West's leg in a long leg cast. In the complaint filed November 29, 1984 West alleged that Dr. Atkins ...

> through his negligence and deliberate indifference to plaintiff's medical needs has denied

> through his negligence and deliberate indifference to plaintiff's medical needs has denied
>
> plaintiff proper and reasonable medical treatment for a badly torn Achilles tendon. ...[J.A. 4]

The issue presented to this Court is identical to that presented to the Fourth Circuit Court of Appeals in ***CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984), cert. denied***, 471 U.S. 1132, 105 S.Ct. 2667, 86 L.Ed.2d 283 (1985). In ***CALVERT*** the Fourth Circuit Court of Appeals reasoned as follows:

> To maintain a § 1983 action a plaintiff must establish as a jurisdictional requisite that the defendant acted under color of state law. ***POLK COUNTY***, 454 U.S. at 315. A person acts under color of state law "only when exercising 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Id.* at 317-18 (quoting ***UNITED STATES v. CLASSIC***, 313 U.S. 299, 326 (1941)). The ultimate issue in determining if a person is subject to suit under § 1983 is whether the alleged infringement of federal rights is fairly attributable to the state. ***RENDELL-BAKER v. KOHN***, 457 U.S. 830, 838 (1982). ...
>
> ***
>
> Unlike the attorney in ***POLK COUNTY***, Dr. Sharp is privately employed. Private physicians exercise their own judgment and make their own medical decisions according to standards not established by the state. ***BLUM v. YARETSKY***, 457 U.S. 991, 1008-09 (1982). Their physician-patient relationships are the same, with the same

> vant of an administrative superior. *See* The American Medical Association Standards for Health Services in Prisons (Standard 102 states: "Matters of medical ... judgment are the *sole* province of the responsible physician.") (Emphasis in original). The American Medical Association Principles on Medical Ethics; The Hippocratic Oaths. The ethical obligations of physicians date back to the time of the ancient Greeks. ***E.g*** , the Hippocratic Oath.

In his brief Calvert recognizes that a physician owes his ethical obligation and undivided loyalty to his patient. The loyalty owed by Dr. Sharp was potentially adverse to the interests of the state. Dr. Sharp had no supervisor or custodial functions. ***Compare POLK COUNTY*** with ***ESTELLE v. GAMBLE***, 429 U.S. 97 (1976), and ***O'CONNOR v. DONALDSON***, 422 U.S. 563 (1975) (in ***ESTELLE v. GAMBLE*** the physicians were employed directly by the state and had custodial or supervisory functions.) Sharp's function and obligation was solely to cure orthopedic problems.

In exercising his judgment in the treatment of inmates, the private physician performs a private function traditionally filled by retained physicians. The professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical service to an inmate. ***See HALL v. QUILLEN***, 631 F.2d 1154 (4th Cir. 1980); ***see also BLUM***, 457 U.S. at 1008-09; *cf.* ***POLK COUNTY*** 454 U.S. at 319-24 (in which the Supreme Court discusses the obligations and functions of attorneys).

****

Calvert and the trial court rely on ***ESTELLE v. GAMBLE*** to support the position that Dr. Sharp acted under color of state law by denying him medical attention. This reliance is misplaced. ***ESTELLE*** establishes that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the Eighth Amendment and can support a § 1983 action. Nevertheless, a plaintiff must still establish that the defendant acted under color of state law. ***POLK COUNTY***, 454 U.S. at 315. ***ESTELLE*** does not mandate, as ***CALVERT*** claims and the trial judge held, that a person who violates an inmate's Eighth Amendment rights is automatically acting under color of state law. Whether the physician acted under color of state law was not an issue in ***ESTELLE***.

Furthermore, in ***POLK COUNTY***, the Supreme Court distinguished ***ESTELLE*** and ***O'CONNOR v. DONALDSON***, 422 U.S. 563 (1975) as follows:

> ***O'CONNOR*** involves claims against a psychiatrist who served as the superintendent at a state mental hospital. Although a physician with traditionally private obligations to his patients, he was sued in his capacity as a state custodian and administrator. Unlike a lawyer, the administrator of a state hospital owes no duty of "undivided loyalty" to his patients.

> On the contrary, it is his function to protect the interest of the public as well as that of his wards. Summarily, ***ESTELLE*** involved a physician who was the medical director of the Texas Department of Corrections and also the Chief Medical Officer of a prison hospital. He saw his patients in a custodial as well as a medical capacity. Because of their custodial and supervisory functions the state employed doctors in ***O'CONNOR*** and ***ESTELLE*** faced their employer in a very different posture than does a public defender. Institutional physicians assume an obligation to the mission that the state, through the institution, attempts to achieve.

POLK COUNTY, 454 U.S. at 320.

> Dr. Sharp is a privately employed specialist who treats private patients as well as inmates. He did not have any custodial or supervisory duties. His obligation was not to the mission of the state but to treat patients referred to him by other physicians. He did not act under color of state law.

The result in the case at bar was dictated by the Fourth Circuit's holding in ***CALVERT v. SHARP, supra.*** In that case a Maryland inmate brought a § 1983 action against the doctor for violation of his Eighth Amendment rights. The defendant

doctor was a private orthopedic surgeon employed by Chesapeake Physicians, P.A. (CPPA), a non-profit corporation, employing numerous physicians and health personnel. CPPA provided medical services to the general public and also medical services to inmates through a contract with the State of Maryland. Calvert was referred to Dr. Sharp on five separate occasions from July 1980 to December 1981. Calvert alleged that Dr. Sharp did not treat him on these visits.

In ***CALVERT***, the Fourth Circuit outlined four factors for a Court to apply when faced with the issue of whether a medical professional acted "under color of state law" when rendering medical services to a state prisoner. The Court should ask:

1. Was there a "sufficiently close nexus" between the state and the medical professional's performance of his or her duties for the prison system, so that his or her conduct in these duties must be treated as that of the state itself?

2. In providing the medical services, was the medical professional exercising a function "traditionally the exclusive prerogative of the state"?

3. In providing the medical services, was the medical professional exercising his or her independent medical judgment without

regard to state interests or deference to state authorities?

4. Was the medical professional performing any custodial or supervisory duties for the state prison system?

These factors must be balanced when determining whether the medical professional's actions were fairly attributable to the state. ***CALVERT*** at 862. The standard adopted by the Fourth Circuit in ***CALVERT*** correctly determines whether a physician's actions were under color of state law. The ***CALVERT*** decision is consistent with this Court's holding in ***POLK COUNTY v. DODSON***, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) and is a correct application of the principles enunciated in that case to the facts of the action ***sub judice***.

In holding that the defendant doctor did not act under color of Maryland law, the Fourth Circuit said "the professional obligation and functions of a private physician establish that such physician does not act under color of state law when providing medical services to an inmate." ***CALVERT*** at 863. On the contrary, privately employed physicians exercise their individual judgment and make their own decisions according to standards not established by the state. In fact the physician's loyalty is to his patients and is often adverse to the state. ***Id.*** The Fourth Circuit also noted that the defendant was not "dependent upon state funds" or performing a "public function," two factors considered to determine if a private act is done under color of state law.

The situation presented in this case is very similar to one presented in ***CALVERT***. Specifically, Dr. Atkins is a private physician who contracted with the North Carolina Department of Correction to provide two orthopedic clinics per week to in-

mates at North Carolina Central Prison Hospital. Pursuant to the contract, Dr. Atkins received a weekly payment for his services but did not receive employee benefits. The doctor performed only medical duties and functions and did not have any supervisory or custodial functions at Central Prison Hospital. That the contract is a direct contract between Dr. Atkins and the state, unlike the situation in ***CALVERT*** where there was an intervening general contractor, does not dictate a different result. "Acts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." ***RENDELL-BAKER v. KOHN,*** 457 U.S. 830, 841, 102 S.Ct. 2764, 73 L.Ed.2d 418, 427 (1982). In ***RENDELL-BAKER*** this Court stated that:

> The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

The school is also analogous to the public defender found not to be a state actor in ***POLK COUNTY v. DODSON***, 454 U.S. 312, 70 L.Ed.2d 509, 102 S.Ct. 445 (1981). There we concluded that, although the state paid the public defender, her relationship with her client was "identical to that existing between any other lawyer and client." ***Id.*** at 318. Here the relationship between the school and its teachers and counselors is not changed because the state pays the tuition of the students.

The relationship between doctor and patient does not change because the state pays for the doctor.[3] Dr. Atkins exercised independent medical judgment without regard to state authorities. Clearly, the balance weighs against finding that Dr. Atkins acted "under color of state law." A person acts under color of state law "only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" ***POLK COUNTY v. DODSON,*** 454 U.S. 312, 317, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), ***quoting UNITED STATES v. CLASSIC***, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). The defendant physician Dr. Atkins, like the defendant physician in ***CALVERT***, was not acting under color of state law. As the Fourth Circuit concluded in ***WEST v. ATKINS, supra:***

> ... [a] professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in ***DODSON***, the professional is a full-time employee of the state. Where the professional exercises custodial or supervisory authority, which is to say that he is not acting in his professional capacity, then a § 1983 claim can be established, provided the requisite nexus to the state is provided.

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3 Providing medical services to inmates is not an "exclusive state function." Decisions made in the day-to-day rendering of medical services by a physician are not the kind of decisions traditionally and exclusively made by the sovereign for and behalf of the public. ***BLUM v. YARETSKY***, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). In ***BLUM*** this Court held that state action was not established in a nursing home's decision to discharge or transfer Medicaid patients to lower levels of care, a decision turning on a medical judgment made by a private party according to professional standards not established by the state and the nursing home not performing a function that has traditionally been the exclusive prerogative of the state. In

In ***CALVERT*** an inmate sued a private orthopedic specialist for an alleged failure to treat. The defendant was employed by a non-profit professional corporation, which in turn contracted with the state. We held that because private physicians exercise independent, professional judgment and render medical care in accordance with professional obligations, a physician when rendering such medical services does not act under color of state law. The defendant in ***CALVERT*** had no supervisory or custodial functions.

We find the reasoning suggested by the appellant [West] to differentiate the rule in ***DODSON*** from that enunciated in ***CALVERT*** unpersuasive. Although the opinion in ***DODSON*** does point out that a public defender in effect plays a role adversarial to the interests of the state, that reasoning was the basis upon which the Supreme Court concluded that a professional may act without color of state law even when he is a full-time employee. In other words, even a full time employee who is a professional can act without color of state law when his role in essence is adversarial to the interests of the state. Thus, 'a public defender is not amenable to administrative direction in the same sense as other employees of the state.' ***DODSON*** at 321. We do not need to address the problematic issue of whether the nature of the doctor-patient relationship can at times be adverse to the interests of the state. Where the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured.

> [West] is probably correct in his argument that the rule enunciated in ***DODSON***, and followed in ***CALVERT***, has the effect of limiting the range of professionals subject to an ***ESTELLE*** action. This effect, however, is entirely consonant with the requirements of § 1983, which statute subjects the individual to liability only where he has acted under color of state law in violating a constitutional right. In any event, it is not for this court to tamper with the limitation of § 1983 liability established in ***DODSON***.

II.

WEST'S EIGHTH AMENDMENT CLAIM

In order for an inmate to bring a claim of inadequate medical care under 42 U.S.C. § 1983 the mistreatment or nontreatment must be capable of characterization as cruel and unusual punishment. Before a federal court will interfere with the internal operations of a state penal facility a prisoner's allegations must reach constitutional dimensions. ***RUSSELL v. SHEFFER,*** 528 F.2d 318 (4th Cir. 1975). However, "where a prisoner has received some medical attention and a dispute is over the adequacy of the treatment, federal courts are generally reluctant to second-guess medical judgments and to constitutionalize claims which sound in state tort law." ***WESTLAKE v. LUCAS,*** 537 F.2d 857, 860 n. 5 (6th Cir. 1976).

In order to recover for a denial of medical treatment, the plaintiff must show deliberate indifference to serious medical needs. The test is whether such deliberate indifference would offend "evolving standards of decency" in violation of the Eighth Amendment. The complaint that a medical professional has been negligent in diagnosing the medical condition does not state a valid claim under the Eighth Amendment. "Medical malpractice does not become a constitutional violation merely

be[3]s a prisoner." ***ESTELLE v. GAMBLE***, 429 U.S. 97, 107, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). As this Court recently stated in ***WHITLEY v. ALBERS***, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986):

> ... To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. This reading of the Clause underlies our decision in ***ESTELLE v. GAMBLE***, ***supra***, 105-106, which held that a prison physician's 'negligen[ce] in diagnosing or treating a medical condition' did not suffice to make out a claim of cruel and unusual punishment. It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, ***supplying medical needs***, or restoring official control over tumultuous cellblock. ....(Emphasis added.)

In short, West's allegations against Dr. Atkins amount to no more than a claim of medical malpractice - which is not actionable under § 1983. The allegations do not show actions which could rise to the level of a violation of the Eighth Amendment.

III.

WEST'S NEGLIGENCE CLAIM

In any event, even if the district court had jurisdiction over Dr. Atkins, which it did not, under ***BAKER v.***

McCOLLAM, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), ***ESTELLE v. GAMBLE, supra, and WESTER v. JONES***, 554 F.2d 1285 (4th Cir. 1977), West's complaint fails to state a cognizable claim for relief under § 1983. As the Fourth Circuit stated in ***WESTER***:

> ...It is undisputed that the doctor examined Wester and found no medical problem. Wester's continued complaints about the same symptoms did not persuade him to change this diagnosis on subsequent occasions. Even if the doctor were negligent in examining Wester and in making an incorrect diagnosis, his failure to exercise sound professional judgment would not constitute deliberate indifference to serious medical needs. Consequently, Wester's own version of the facts do not support his claim for violation of the Eighth Amendment. We therefore conclude that the district court properly granted summary judgment in favor of the prison authorities.

West's allegations arising out of his claim that Dr. Atkins

> ... Through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for a badly torn Achilles tendon ...

sets forth, at best, a negligence based claim. Negligence of prison officials is not actionable under § 1983. ***See DAVIDSON v. CANNON***, 474 U.S. 898, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); ***DANIELS v. WILLIAMS***, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). In these cases, this Court held that a due process deprivation does not arise from a "negligent act of an official causing unintended lost or injury to life, liberty of

property." Furthermore, West's allegations do not amount to deliberate indifference to his medical needs. ***ESTELLE v. GAMBLE***, ***supra***. In any event, differences concerning a course of treatment do not amount to a constitutional violation. ***BOWRING v. GOODWIN***, 551 F.2d 44, 48 (4th Cir. 1977).

CONCLUSION

In ***BAKER v. McCOLLAM, supra,*** this Court held that § 1983 does not impose liability for violations of duties of care arising out of tort law and the remedy for that type of injury must be sought in state court under traditional tort law principles. This Court noted, citing ***ESTELLE v. GAMBLE, supra,*** that just as medical malpractice does not become a violation of the federal constitution's prohibition of cruel and unusual punishment merely because the victim is a prisoner, false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official. This Court's reasoning in ***BAKER v. McCOLLAM, supra***, was expanded in ***PARRATT v. TAYLOR,*** 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), in which this Court stated that:

> ...to accept the respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting "under color of state law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who was invclved in nothing more than án automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning would "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." ***PAUL v. DAVIS***, 424 U.S. 693, 701, 47 L.Ed.2d 405, 96 S.Ct. 1155. We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

For the foregoing reasons, Respondent respectfully prays that the ***en banc*** opinion of the Fourth Circuit Court of Appeals filed April 9, 1987 be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served three (3) copies of the foregoing BRIEF FOR THE RESPONDENT on the attorney of record by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

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This the 12th day of January, 1988.

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No. 87-5096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

QUINCY WEST,

Petitioner,

vs.

SAMUEL ATKINS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE NATIONAL PRISON PROJECT OF THE ACLU FOUNDATION, AND THE NORTH CAROLINA CIVIL LIBERTIES UNION LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did a physician who was under contract to provide orthopedic services to inmates at a state prison hospital act under color of state law for purposes of §1983 in his treatment of a North Carolina state prison inmate?
2. Do prison physicians--whether permanent members of a state prison medical staff, or under contract with the state prison--act under color of state law for purposes of §1983 liability in their treatment of state prison inmates?

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INTEREST OF AMICI[1]

The American Civil Liberties Union Foundation (ACLUF) is a nationwide, non-partisan organization of over 250,000 members. The ACLUF is dedicated to preserving and protecting the Bill of Rights. The North Carolina Civil Liberties Union Legal Foundation is one of the ACLUF's state affiliates. The ACLUF established the National Prison Project in 1972 to protect and promote the constitutional and civil rights of inmates. The National Prison Project is the only public interest prison litigation project in the country with a national docket and the Project has a particular interest in prison health care issues.

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[1] The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

STATEMENT OF THE CASE

On November 23, 1984, the petitioner, a prisoner in the North Carolina prison system, filed a pro se complaint alleging that two prison administrators and Dr. Atkins, a physician under contract to the prison system, had been deliberately indifferent to his serious medical needs regarding a torn tendon.[2]

The response filed by the Attorney General's Office on behalf of Dr. Atkins indicated that Dr. Atkins received over $50,000 per year to provide two weekly orthopedic clinics to prisoners at the

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[2] Among petitioner's allegations in his complaint was that another physician under contract to the North Carolina system had ordered petitioner transferred to another prison for medical treatment. (R.5) Such transfers are provided for in the North Carolina Department of Correction Health Care Procedures §203.3(B). Petitioner also alleged in his complaint that, among numerous other attempts to procure medical treatment, he had filed a grievance through the institutional grievance system about Dr. Atkins, and that the prison's response to the grievance had been that petitioner was scheduled to see Dr. Atkins. R.10.

Central Prison Hospital. Although the affidavits filed in connection with the Attorney General's response alleged generally that contract physicians had no custodial or supervisory duties in relation to prisoners,[3] the affidavits do not specifically deny the allegations of the complaint.[4] In addition, the affidavits indicate that the medical service providers are under the administrative authority of the warden of the unit, so that the warden can order a contract physician to examine a specific prisoner. R.28. The contract physicians are also subject to the regulations and orders outlined in the Department's Health Care Procedures Manual, which orders are also approved by the unit

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[3] R.23, R.29.

[4] For example, the affidavits do not deny the petitioner's allegations cited in n.2, supra.

physician. Id.[5]

The trial court granted summary judgment that Dr. Atkins' alleged conduct did not constitute state action. A panel of the Fourth Circuit reversed and remanded. West v. Atkins, 799 F.2d 923 (4th Cir. 1986).

Subsequently, the Fourth Circuit Court of Appeals en banc reversed the panel and reinstated the summary judgment against the petitioner. West v. Atkins, 815 F.2d 993 (4th Cir. 1987).[6] While the precise holding of the Court of Appeals in its en banc decision is somewhat unclear, the holding appears to be that a prison physician does not act under color of state law

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[5] The Manual prescribes, for example, the precise procedures that a physician must follow when giving an intake physical and placing a prisoner in a health grade for purposes of work assignments. (§202.2).

[6] Whether the complaint states a claim under Estelle v. Gamble, 429 U.S. 97 (1976) has not been decided by any lower court and is not before this Court.

except when the physician performs custodial and supervisory, rather than strictly medical, duties. Apparently the Fourth Circuit would not have found state action to be present even if Dr. Atkins had been a full-time state employee. Id. at 995.

It is possible that the holding is substantially narrower, that the acts of a contract physician do not constitute state action. If this is the holding, then the case restates the rule the Fourth Circuit established in Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985).

This Court granted a writ of certiorari on October 19, 1987.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals may stand for two different rules, one of which is considerably broader than the other. Apparently the decision of the Court of Appeals stands for the principle

that the acts of a physician in the course of undertaking the medical treatment of a prisoner do not constitute state action. It is possible that the decision may stand for the narrower proposition that the acts of a physician under contract to provide medical care do not constitute state action.

Prison medical care has a tradition of deliberately indifferent care for three interrelated reasons: prisoners are an isolated and disliked minority; prisons are closed institutions; and prisoners have no choice in the medical care provided them. These factors significantly increase the possibilities for the misuse of power, requiring a finding that prison medical care constitutes state action.

Because prisons have a constitutional duty to provide medical care and because prisoners have no choice in medical care, prison medical care is an exclusively

public function, so that state action is present. Similarly, the close relationship between the State and physicians delivering medical care satisfies the "nexus" test for state action. Indeed, the symbiotic relationship among the State, the physician and the prisoner makes this case legally indistinguishable from Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

The central error in the decision of the Court of Appeals comes from its misapplication of Polk County v. Dodson, 454 U.S. 312 (1981). The Court of Appeals wrongly focused on the relationship between the public defender and her client in Polk County, when the Court of Appeals should have analyzed the relationship between the public defender and the State. On this test, which was the basis for this Court's analysis in Polk County, prison physicians lack the uniquely adversarial relationship with the State that justified the refusal

to find state action in Polk County.

Finally, affirmance of the decision of the Court of Appeals, on either the broad or narrow grounds asserted by the Fourth Circuit, will have disastrous effects in reversing recent improvements in prison health care. If this Court should affirm on the broad ground, such a decision would remove most challenges to prison medical care, including injunctive actions, from the reach of the Constitution. Even if this Court were to affirm the Court of Appeals on the narrow ground of the respondent's status as a contract physician, such a decision would have the undesirable result of providing prison administrators with a subterfuge for avoiding federal court review.

ARGUMENT

I. MEDICAL CARE IN PRISONS HAS TRADITIONALLY BEEN DISTINCTLY SEPARATE FROM AND INFERIOR TO COMMUNITY HEALTH CARE

The apparent holding of the Court of Appeals that the actions of a prison physician[7] performing medical duties do not constitute state action, if adopted by this Court, would radically alter the current understanding of the state action doctrine and in substance overrule this Court's decision in Estelle v. Gamble, 429 U.S. 97 (1976), that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment.

The consequences to prison health care of a decision insulating such care from

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[7] While we speak throughout this brief of physicians, other prison medical practitioners, including nurses and physicians assistants, may well be affected by the decision in this case. The decision of the Court of Appeals does not clearly address whether the acts of such auxilliary health care providers constitute state action.

federal court review under the Estelle v. Gamble standard are extraordinarily serious, because federal court review has played a critical role in protecting prisoners from grossly inadequate and sometimes horrifying failures to provide basic medical care.

In Appendix I, we provide excerpts from just a few of the published cases in which federal courts found themselves required to enter a comprehensive injunctive order because of systemic failures to provide adequate medical care. These cases are but a sample of the cases that have found prison medical systems to be deliberately indifferent to the serious medical needs of prisoners.[8] The cases

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[8] See also Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979), on remand, 487 F.Supp. 638 (W.D.Penn. 1980); Todaro v. Ward, 431 F.Supp. 1129 (S.D.N.Y. 1977), aff'd, 565 F.2d 48 (2nd Cir. 1977); Inmates of Occoquan v. Barry, 650 F.Supp. 619 (D.D.C. 1986); Balla v. Idaho State Board of Corrections, 595 F.Supp. 1558 (D.Id. 1984); Martino v. Carey, 563 F.Supp. 984 (D.Or. 1983); Capps v. Atiyeh, 559 F.Supp. 894 (D.Or. 1982); Burks v. Teasdale, 492 F.Supp. 650 (W.D.Mo. 1980); and Palmigiano v. Garrahy, 443 F.Supp. 956 (D.R.I. 1977), cert. denied, 449 U.S. 839 (1980).

demonstrate patterns of failures[9] to

[9] The once widespread practice of using untrained prisoners as "nurses," referred to in some of the excerpts in Appendix I, is one such pattern. See also Cody v. Hillard, 599 F.Supp. 1025 (D.S.D. 1984), rev'd on other grounds, 830 F.2d 912 (8th Cir. 1987) (en banc); Grubbs v. Bradley, 552 F.Supp. 1052, 1129 (M.D.Tenn. 1982); and Nicholson v. Choctaw County, Alabama, 498 F.Supp. 295 (S.D.Ala. 1980). Interestingly, North Carolina is among the states that still allows the use of prisoners to provide health care services. §714.2 of the Department's Health Care Procedures Manual allows the use of prisoners as x-ray technicians, operating room technicians, nurses' aides and physical therapy assistants.

Another systemic source of deliberate indifference is the practice in some states of using physicians who are not allowed to treat ordinary citizens to provide medical services in prisons. Four states, Florida, Colorado, Kansas, and Vermont currently grant limited or special institutional licenses to physicians allowing them to practice in penal institutions. Additional states have discontinued the practice of allowing unlicensed physicians to work in prisons, including Alabama, North Dakota and Oklahoma. See Federation of State Medical Boards of the United States, The

examine and diagnose; failures to provide universally recognized treatment; failures to provide basic nursing care; delegations of medical duties to untrained persons, including prisoner "nurses"; failures to have available necessary medical equipment; and pure neglect.

As this Court noted in Rhodes v. Chapman, 452 U.S. 337 at 352 (1981), "[c]ourts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as 'deplorable' and 'sordid.'"[10] Precisely because federal

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Exchange (1987), (medical licensing survey). See also Vt.Stat.Ann.tit.3, §261 (1987) and Colo.Rev.Stat. §17-1-101 (1986).

[10] In addition to citing Bell v. Wolfish, 441 U.S. 520 (1979), the Court in Rhodes, at this point in its opinion cited in a footnote cases in which federal courts had granted relief on a number of conditions of confinement, including, in all cases, the denial of adequate medical care. 452 U.S. 352, n.17.

courts have discharged their duties, prison medical care has made enormous strides in the last twenty years. If prison physicians who perform medical functions with deliberate indifference to serious medical needs are not within the reach of the Constitution, then the possibility of federal court intervention in a State's prison health care system will all but disappear. Removal of the possibility of federal intervention could have disastrous consequences for these recent improvements in prison medical care.

Some of the possible consequences of the removal of constitutional review of prison medical care can be seen by examining prison medical care in Maryland. Beginning in 1981, Maryland moved to a contract system in order to provide comprehensive health care for prisoners confined to its penal facilities. According to a 1986 Study commissioned by the Maryland

Legislature, the State by contracting with a private provider intended to shift its responsibilities for the delivery of health services[11] and apparently also sought to avoid federal court intervention and liability for injuries suffered as the result of inadequate treatment and care.[12]

The Study found that the State did not monitor how the private providers carried out its obligations under the contract. According to the Study "...there was

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11 Virtually all the medical care provided to Maryland prisoners is provided through contract services rather than directly by state employees. NKC Management, Evaluation of the State of Maryland's Medical Services Program for Inmates, November, 1986, pp. 3-5, 19, 32.

12 While "[i]t was impossible for [the Study] to determine the motivation for this transition [to a private contractor].... there was certainly the implied assumption that by contracting, DOC put distance between itself and the ever present liability for adequate health care." Study at 19. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715 at 725 (1961): "But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."

certainly the implication that since the delivery of health care was 'turned over' to the contractor, DOC was relieving itself of at least this area of responsibility. This attitude was manifest by gross management inattention."[13]

The Study found that even under the contract Maryland maintained a "non-system" that "historically.... harbor[s] a great deal of undiagnosed and untreated disease."[14] To underscore this conclusion the Study was severely critical of the health care program's performance during a 1983 syphilis epidemic at the House of Correction and "difficulties associated with a tuberculosis outbreak" in 1984.[15]

The apparent decision of the State of Maryland to attempt to avoid constitutional

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13 Id. at 19. See also 97, 143, 180 and 193-196.

14 Id. at 99.

15 Id. at 111.

constraints proved successful when the Fourth Circuit decided Calvert v. Sharp, supra, holding that actions of the Maryland contract physicians did not constitute state action. Accordingly, under current Fourth Circuit doctrine, Maryland prisoners have been deprived of any obvious possibility of constitutional protection from systemically deficient medical care.

The sequence of events in Maryland illustrates the dangers of affirming the Court of Appeals on either broad or narrow grounds. If the Court of Appeals were to be affirmed on the broad ground that all medical care offered prisoners by physicians is beyond the reach of the Constitution, then prison health care might generally revert to its former state. If an affirmance were limited to contract care physicians, other states might join Maryland in choosing contract health care simply to avoid constitutional requirements.

II. THE STATE ACTION DOCTRINE MUST BE CONSTRUED IN LIGHT OF THE UNIQUE RELATIONSHIP BETWEEN PRISONERS AND THE STATE

The tradition of severely deficient prison health care must be considered in determining the reach of the state action doctrine because, for the reasons set forth in this section, this tradition results from the unique legal relationship between the State and prisoners. This unique relationship removes the ordinary checks against the misuse of power possessed by virtue of state law. It is, of course, this misuse of power made possible because the wrongdoer is clothed with the authority of state law that justifies a finding of state action. Cf. United States v. Classic, 313 U.S. 299, 326 (1941).

There are three primary reasons for the problems in prison health care discussed in the previous section of this brief: (1) the political process is

unlikely by itself to protect the interests of prisoners in basic health care; (2) the medical care provided prisoners is likely to be isolated from the medical care provided in the community; and (3) market controls on the quality of services do not operate because prisoners uniquely have no option to reject the medical care profferred by the state.

First, prisoners are the paradigmatic example of a "discrete and insular" minority that is hampered by the kind of public prejudice that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[16] While the general prejudice against prisoners has understandable roots, no one suggests that the appropriate punishment for crime includes the denial of basic medical care.

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16 United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938).

Aside from the Eighth Amendment bar to such punishment, denial of basic medical care would operate irrationally as a punishment. Comparatively minor offenders could be the most heavily punished if they happened to have serious medical needs.

The second factor that should affect the reach of the state action doctrine in the context of prison medical care is the obvious fact that prisons are not, by their nature, open institutions. It is this fact that provides much of the justification for the application of the Eighth Amendment to prisons. Cf. Ingraham v. Wright, 430 U.S. 651, 669-670 (1977):

> The prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of normal life".... Prison brutality, as the Court of Appeals observed in this case, is

> "part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny."
>
> * * *
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.... As long as the schools are open to public scrutiny, there is no reason to believe that the common-law constraints will not effectivcly remedy and deter excesses such as those alleged in this case.

(Citations and footnotes omitted)

The closed nature of prison institutions is one of the major factors that has led to a class of medical care in prisons, distinctly different from, and inferior to, medical care provided to the general community.

The third important factor structurally affecting prison health care is the fact that prisoners almost universally have no choice regarding medical care. See

Appendix II, infra. The sole source of the medical care that a prisoner is eligible to receive is that care that the State chooses to provide. Cf. Preiser v. Rodriguez, 411 U.S. 475, 491-492 (1973):

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, or with his banker becomes, for the prisoner, a dispute with the State.[17]

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[17] The Court in Preiser noted the unusual relationship of prisoners to the State in the context of applying an exhaustion requirement to challenges to the fact or duration of confinement under the habeas corpus statute. The Court specifically reaffirmed, however, that §1983 is "a proper

This Court has specifically recognized that the State has an obligation to provide medical care to prisoners:

> These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.

Estelle v. Gamble, 429 U.S. at 103. See also City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983) (due process clause requires the responsible government agency to provide medical treatment to persons injured while being apprehended by the police) and Youngberg v. Romeo, 457 U.S. 307, 317 (1982).[18]

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remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." Id. at 499.

[18] The Court's pronouncements on this issue also reflect the common-law rule that the State must provide medical care for prisoners because incarceration makes it impossible for prisoners to secure their own care. Ironically, the case widely cited for

Although these three factors--prisoners' low status in society, the closed nature of prisons, and prisoners' abnormal degree of dependency upon the State for the most basic necessities of life--are logically distinct, their effects are harder to disentangle.

One consequence of the status of prisoners is that, if not an "iron curtain,"[19] between medical care in the community and prison medical care, there have certainly been important barriers between the two. These barriers make possible the misuse of power under the apparent authority of state law and have

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the common-law rule is a North Carolina case. Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926), cited in Estelle v. Gamble, 429 U.S. at 104, n.9. Spicer was not a malpractice case; it involved a dispute among a doctor, a sheriff, and a county Board of Commissioners over responsibility for the cost of surgery for a jail inmate.

[19] Cf. Wolff v. McDonnell, 418 U.S. 539, 555-556 (1974).

resulted in prison medical care that has been both distinct from community health care and distinctly inferior.

III. PRISON MEDICAL CARE IS A PUBLIC FUNCTION

A. Prison Medical Care Involves a Constitutional and Common-Law Duty

Prison medical care is different from most other things that governments do. Prison medical care is a public function because it is an inescapable duty of the State to provide such care. See pp. 21-22, supra. It was precisely at this point that the Court of Appeals made a significant error. The Court of Appeals analyzed whether medical care, in general, was an exclusively public function, and understandably decided that it was not. West v. Atkins, 815 F.2d at 996, n.2.

Obviously, the correct analysis would have been to determine whether prison medical care, not medical care in general,

is an exclusively public function. Cf. Youngberg v. Romeo, 457 U.S. at 317:

> As a general matter, a State is under no constitutional obligation to provide substantive services for those within its borders. See Harris v. McRae, 448 U.S. 297, 318, 100 S.Ct. 2671, 2689, 65 L.Ed.2d 784 (1980) (publicly funded abortions); Maher v. Roe, 432 U.S. 464, 469, 97 S.Ct. 2376, 2380, 53 L.Ed.2d 484 (1977) (medical treatment). When a person is institutionalized and wholly dependent on the State it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.

(Citations omitted)[20]

When a private entity exercises powers that are traditionally and

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[20] Because medical care in general is not an exclusively public function, petitioner's position is consistent with the Court's decision in Blum v. Yaretsky, 457 U.S. 991, 1011 (1982) (medicaid recipients failed to establish that state action existed in nursing homes' decision to discharge or transfer medicaid patients; nursing homes do not perform an exclusively public function).

exclusively reserved to the State, state action exists.[21] Jackson v. Metropolitan Edison Company, 419 U.S. 345, 352 (1974). Where the State has a duty to perform the function, state delegation of the duty to an ostensibly private actor does not strip performance of the duty of its character as a public function. Cf. Jackson v. Metropolitan Edison Company at 352-353:

> If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a

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[21] In this brief, amici discuss only the state action doctrine. We do not discuss separately the test of whether the action occurred under color of state law because these doctrines lead to identical results. United States v. Price, 383 U.S. 787, 794, n.7 (1966); see also Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 927-932 (1982).

> state function or a municipal duty.

(Citations omitted)

In contrast, the North Carolina courts have specifically held that the State does have a duty to provide medical care for prisoners. Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

B. Prison Health Care Is Exclusively a Public Function

In Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159 (1978), this Court noted that the branches of the public function doctrine had in common the feature of exclusivity:

> Although the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas [so that state action was found in Terry v. Adams, 345 U.S. 461 (1953)], and the streets owned by the Gulf Shipbuilding Corp. were the only streets in Chickasaw, [so that state action was found in Marsh v. Alabama, 326 U.S. 501 (1966)], the proposed sale by Flagg Brothers under §7-210 is not the only means of resolving

> this purely private dispute. Respondent Brooks has never alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage.

Flagg Bros., Inc., at 159-160.

In short, Flagg Bros., Inc. interpreted exclusivity to mean that the affected citizen had no choice. Under this definition, prison health care is an exclusively public function in this case, because by state law the only medical care the petitioner can receive is medical care provided by the State through Dr. Atkins.[22] Our survey of state statutes indicates that virtually all states deny prisoners the option to choose medical care of their own

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[22] The Chief of Health Services in North Carolina can approve applications by minimum security prisoners to obtain medical services outside the Department at the prisoner's own expense. Department of Correction Health Care Procedures Manual §710.2. Petitioner was not a minimum security prisoner.

choice.[23] See Appendix II.

In short, this case involves a duty on the part of the State, recognized under the United States Constitution, the decisional law of the State, and the affirmative command of state law, that prisoners have no choice but to accept the medical care the State chooses to provide.[24]

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[23] Contrary to the impression created in the Fourth Circuit's previous decision in Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert. denied 471 U.S. 1132 (1985), prisoners in Maryland also have no choice about the provision of medical care. The Maryland statute relied upon by the Fourth Circuit in Calvert gives to the State the right to determine that prison facilities are inadequate, so that the prisoner may be treated elsewhere. It remains exclusively the State of Maryland's prerogative to determine who treats the prisoner and where. See Md. Code. Ann. Art. 27 §698 (1982).

[24] This case does not require the Court to address the reach of the state action doctrine with regard to the actions of a physician providing care in the community who occasionally treats a prisoner for serious medical needs. On the one hand, the prisoner's lack of choice would suggest that state action is present. On the other hand, care in the community generally differs from traditional prison health care because it takes place in an open environ-

IV. THE NEXUS BETWEEN THE STATE AND DR. ATKINS IS SO CLOSE THAT PETITIONER'S TREATMENT IS FAIRLY CHARGEABLE TO THE STATE

In Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982), the Court set up a two-part test for determining whether conduct allegedly causing the deprivation of a federal right may be fairly attributed to the State:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a person for whom the State is responsible[25]... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

ment. For that reason, the possibilities for the misuse of power are reduced and a finding of state action is less necessary to protect core constitutional values.

[25] In this case, of course, the first test under Lugar is met because the State has exercised its right to imprison the petitioner and has further deprived the petitioner of any method apart from the State to provide for his medical needs.

Id. at 937

One of the specific tests established by the Court for the second component of the state action test is the "nexus" test. Lugar at 938-939, citing Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975). As noted supra, in Jackson this Court first found that the utility did not perform a public function because the State was under no obligation to provide utility services. The Court then undertook a factual analysis of the various facets of the interaction between the State and the utility, and concluded that the State under the particular facts of the case was not tied closely enough to actions of the utility for the utility to be characterized as a state actor. Jackson at 358-359.

In this case, Dr. Atkins was provided over $50,000 per year to provide care on state premises for patients whom the State

was required to treat. On this record, the authority to order medical transfers was shared between the contract physicians and custody staff.[26] The State's direct control over the contract physicians included the warden's right to order the examination of specific prisoners and the physicians' responsibility to practice in accordance with the Department's Health Manual.[27] Accordingly, in this case the

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[26] The affidavits filed by respondents in the trial court did not specifically discuss the allegations of the complaints with respect to prisoner medical transfers. The affidavits deny in a conclusory fashion that Dr. Atkins has any custodial or supervisory services. The Health Care Procedures Manual of the Department of Correction sets forth the procedures for medical transfers to Central Prison Hospital. See §203.3(B). Since the case was decided on summary judgment, the allegation that contract physicians can order transfers should be taken as true for the purposes of deciding whether summary judgment was appropriate.

[27] See p.4, n.5, supra, setting forth some of the instances in which physicians must follow medical procedures prescribed by the Manual. In Jackson, the state utility commission simply approved a practice applicable to the utility, but did not overtly or covertly intend to encourage

close nexus between the State and Dr. Atkins requires a finding of state action.

The failure of the Court of Appeals to examine the close nexus between Dr. Atkins and the State led it to another fundamental error. A basic premise of the decision of the Court of Appeals is that there is a bright line between medical and custodial functions in the context of correctional medicine. No such bright line exists. As the Department of Correction Health Care Procedures Manual states:

> The provision of health care is a joint effort of correctional administrators and health care providers, and can be achieved only through mutual trust and cooperation.

§100.5

This record illustrates a few of the points at which such a line disappears. One such instance is, of course, peti-

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the practice. 419 U.S. 350, n.7. Here, the Department's Manual, issued on behalf of the State, applies to both contract physicians and state employees. R.28.

tioner's transfer to another prison for medical treatment. Another such point that petitioner notes in his complaint is his reference to having his medicine taken from him when he arrived at a new prison. "After plaintiff protested the nurse explained that it were (sic) a prison policy that such medication entering central (prison) be seized and that plaintiff would be scheduled to see the doctor so the medication could be re-prescribed by the unit Doctor." R.7. In addition, the complaint refers to petitioner's understanding that Dr. Atkins would prescribe something other than standard prison-issue shoes, although apparently Dr. Atkins never prescribed such shoes. R.8.

Other common examples of the blurring of the medical and custodial roles include performing x-rays or body cavity searches

for security reasons[28] and examining a prisoner to determine if there is a medical reason to exempt him or her from prison duties.[29]

The close nexus between the State and medical care providers requires this Court to reject the argument that a prison medical provider's duties can be divided into artificial categories of purely medical and purely custodial duties.

V. POLK COUNTY v. DODSON DOES NOT CONTROL THIS CASE

In both its broad and narrow

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28 See, e.g., U.S. v. Lilly, 576 F.2d 1240, 1243 (5th Cir. 1978). The Department of Correction Health Care Procedures Manual requires that medical personnel perform body cavity searches. See §704.2.

29 See, e.g., Finney v. Mabry, 534 F.Supp. 1026, 1033, n.1 (E.D.Ark. 1982). In his complaint, petitioner refers to being confined to his bed for a week by the unit physician. R.11. The Department of Correction Health Care Procedures Manual provides that physicians will place a prisoner in a particular health care classification. This classification determines eligibility for work assignments. See p.4, n.5, supra.

rulings,[30] the Court of Appeals erroneously applied Polk County v. Dodson, supra, to this case. In Polk County, this Court decided that a public defender does not act under color of state law when he or she represents an indigent defendant. Essentially, this Court gave three related reasons for its decision.

First, the Court noted that unlike the institutional physicians in Estelle v. Gamble, supra, and O'Connor v. Donaldson, 422 U.S. 563 (1975), the public defender owes a duty of undivided loyalty to the client. The physicians in O'Connor and Estelle, on the contrary, "assume an obligation to the mission that the State, through the institution, attempts to achieve." Polk County at 320.

Although the Court in Polk County also noted that the physicians sued in O'Connor and Estelle held supervisory positions, the

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30 See pp. 4-5, supra.

actions for which they were sued involved their medical functions. The particular actions that O'Connor and Estelle implicitly considered as state action were actions undertaken as treating physicians--precisely the actions of Dr. Atkins challenged by petitioner.

As noted above, the record in this case in fact shows a close relationship between the medical and custodial actions of a contract physician like Dr. Atkins. In contrast, this Court distinguished public defenders from the physicians in Estelle and O'Connor precisely because all of the public defenders' functions were adversarial to the State.

The second reason this Court gave in Polk County for not finding state action is that a public defender is not amenable to administrative direction in the same sense as other employees of the State. Polk County at 321. Both contract and direct

employee physicians in North Carolina, including Dr. Atkins, use a Manual promulgated by the State that specifies important treatment areas in which physicians are subject to administrative direction by the State.[31]

Finally, this Court in Polk County placed great reliance on the paradoxical nature of the duty of the State to provide legal counsel to indigent defenders. Although the State has such a duty, at the same time the State must provide legal counsel "free of state control." Id. at 322. This special adversarial relationship between public defender and the State

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31 The Court also noted that public defenders are "held to the same standards of competency and integrity as a private lawyer." Id. As noted at pp. 11-12, n.9, supra, prison doctors in several states are not necessarily held to the same licensure standards as physicians treating the general public. Moreover, the actions of lawyers are automatically subject to considerable scrutiny by the courts before which they practice. There is no comparable source of automatic review for the actions of physicians.

explicitly underlies the Polk County decision and distinguishes prison doctors from public defenders.

In addition to its misapplication of this Court's decision in Polk County, the decision of the Court of Appeals also ignored Youngberg v. Romeo, 457 U.S. 307, supra, in which this Court held that an institutionalized mentally retarded citizen had a protected liberty interest in reasonably safe conditions of confinement and freedom from unreasonable bodily restraints. Although the defendants in Youngberg were administrators and not physicians,[32] the standards for damages liability established by the Court obviously do not distinguish between physicians and other professionals. This Court held that liability for constitutional violations could be imposed on a professional only when the decision by the

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32 Id. at 310, n.3.

professional is such a substantial departure from accepted professional judgment, practices or standards that the responsible person did not base the challenged decision on such a judgment. Id. at 323. In the course of this holding, the Court specifically defined the term professional in a manner equally applicable to correctional administrators and physicians:

> By "professional" decision-maker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded.

Id. at n.30.

Accordingly, the decision of the Court of Appeals, which on its face exempts all physicians except possibly those with obvious supervisory or custodial functions from the commands of the Constitution, is

directly inconsistent with this Court's standards for liability for damages under the Constitution as set forth in Youngberg.

VI. THE DECISION OF THE COURT OF APPEALS CANNOT BE RECONCILED WITH BURTON v. WILMINGTON PARKING AUTHORITY

Affirming the Fourth Circuit decision, even on the narrower ground focusing on the physician's status as an independent contractor, would require the overruling of Burton v. Wilmington Parking Authority, supra, a central case in the modern development of state action law.[33] Burton involved a parking authority owned and operated by the State that had as a lessee a private restaurant. The Court found that

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[33] Although this Court has on occasion distinguished Burton, it has never suggested that Burton is no longer good law. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 842-843 (1982). Indeed, the very factors that Rendell-Baker stressed as distinguishing that case from Burton (that the relevant functions took place on public property and that the State profited from the unconstitutional conduct), in this case argue for the application of Burton.

there was a symbiotic relationship among the Parking Authority, the restaurant and the particular state action challenged: the existence of the parking encouraged patrons to use the restaurant, the parking authority directly profited from the restaurant's operations, and the restaurant alleged that it would lose profits if it ceased discriminating against blacks. Accordingly, the restaurant's racial discrimination was, in these circumstances, an indispensable element in the success of the parking authority. Id. at 724.

All of the same elements appear in this case. The relationship of the prison to the physician providing medical care within the prison parallels the relationship of the parking authority and the restaurant in Burton. As noted in previous sections, North Carolina is required under the Constitution to provide basic medical

care to prisoners.[34] See pp. 24-27, supra. Accordingly, North Carolina gains a direct benefit from the services performed by the physicians. Similarly, the physician gains a direct and substantial financial benefit from the arrangement.

In addition, the benefit to North Carolina is precisely tied to the doctor's actions: the State purports to discharge its undeniable obligation to the prisoners through the services it pays the doctor to deliver. Indeed, there is even a closer relationship between the two cases. In Burton, the authority allegedly profited by the restaurant's racial discrimination, which the authority could not have undertaken directly on behalf of the State. In this case, if there is no state action in deliberately indifferent actions by

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[34] In one respect, this case presents stronger grounds for finding state action than Burton. This case, unlike Burton, also involves a traditional public function.

physicians, the State will have a financial interest in the deliberate under-provision of medical services. See the discussion of the State of Maryland's decision to contract out medical care in its system, supra, pp. 13-16.

It should be particularly noted that neither Burton nor a reversal in this case requires the Court to find state action in activities less closely related to the essential state function. For example, neither Burton nor a reversal in this case would require the federal courts to find state action implicated in the employment relationships existing among private contractors. Employment decisions are not directly related to the State's interest in discharging the public function of providing basic medical care for prisoners. Nor do they have any relationship to concerns that the handing over of traditionally public functions to private hands is simply

a subterfuge to allow the State to violate the Constitution.

A decision finding state action here would not disturb the holding in Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In Rendell-Baker, this Court refused to find state action in the discharge of teachers at a privately operated high school, although almost all of the students at the school had their tuition paid by the State. The Court noted that while the school was generally the subject of extensive regulation, there was little regulation of personnel functions. Id. at 841. Presumably, the extensive state regulation in Rendell-Baker was directed at those matters with direct impact on the students, since education was the public function involved in the case.

Accordingly, this case is on all fours with Burton because there is a truly symbiotic relationship between the State

and the ostensibly private actor. The activity discharges an obligation of the State for a traditionally exclusively public function, and the challenged action is directly related to the discharge of the public function.

VII. POLICY CONCERNS SUPPORT A FINDING OF STATE ACTION HERE

Presumably, the policy concerns behind the broad refusal of the Court of Appeals to find state action involve a reluctance to subject the actions of medical doctors to federal court review. Such a concern would be appropriate if a finding of state action would convert malpractice actions into constitutional torts. But Estelle v. Gamble, supra, already disposes of this concern with its holding that the proper standard is one of deliberate indifference; mere negligence or malpractice will not

suffice.[35] Accordingly, the policy concerns that apparently led the Court of Appeals to place physicians' actions beyond the reach of the Constitution are better addressed by the substantive rule of liability developed by this Court.

The decision of the Court of Appeals is particularly dangerous because a failure to find state action in a physician's actions would mean that injunctive actions, as well as damages actions, would be barred. Affirming the Fourth Circuit's decision on this basis would radically alter existing law by removing almost the entire subject of prison health care from federal court jurisdiction.[36]

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[35] Deliberate indifference damages claims cognizable in federal court might also state malpractice claims in state court. This partial overlap of claims does not offend the Constitution. Cf. Monroe v. Pape, 365 U.S. 167 (1961).

[36] It is true that administrative officials would still be subject to injunctive orders. But such orders would necessarily be ineffective as to many

To the extent that the decision of the Court of Appeals, like its earlier decision in Calvert v. Sharp, may be limited to contract physicians, there are substantial policy reasons for this Court to reject this line-drawing. For the reasons given earlier in this brief, it is absolutely critical that federal courts continue to assure that the State's duty to provide basic medical care to prisoners is enforced. If States can avoid this duty by contracting out medical services, States will have an obvious incentive to do so, with possibly disastrous results for prison health care. Certainly the Maryland experience demonstrates the reality of this threat. See pp. 13-16, supra.

Except to assure that the State's

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critical aspects of medical care carried out directly by physicians and other health care providers. Moreover, such orders potentially could cause problems by requiring custody officials to supervise the delivery of medical care by physicians.

constitutional duties are respected, this Court has no interest in affecting whether States provide medical care through state employees or contract out such care. A decision finding state action in the type of medical care provided by Dr. Atkins will be such a neutral decision, because a desire to avoid constitutional requirements cannot affect a decision on how to provide medical services.[37]

At the same time, such a decision will not discourage contracting out medical services when otherwise in the State's interest. The State can indemnify contract practitioners for constitutional liabili-

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[37] This approach would be consistent with City of Revere v. Massachusetts General Hospital, supra, in which the Court held that although there was a constitutional duty to provide medical care to jail inmates, the Constitution does not dictate how the cost of that care should be allocated between the jail and the provider of the medical care.

ty,[38] and it can also provide for representation for medical providers in federal court. Indeed, North Carolina has already provided such legal representation to contract care providers. This is why, ironically enough, it is the North Carolina Attorney General Office that argues before this Court that Dr. Atkins' action on behalf of the State did not constitute state action.[39] Because a decision finding state action will not discourage contractual medical relationships, except contractual medical arrangements solely designed to avoid constitutional mandates, this Court should not hesitate to find state action in this case.

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38 As noted supra, pursuant to Estelle v. Gamble, supra, the scope of liability under the Constitution does not include malpractice actions.

39 See N.C.Gen.Stat. 143.300.7.

CONCLUSION

The decision of the Court of Appeals, in its broad reading, is a truly radical one that, if affirmed, would dramatically alter the current understanding of the state action doctrine. Because it would deprive federal courts of jurisdiction over virtually all aspects of prison health care to prisoners, it would undo much of the progress made in providing minimally adequate health care in the nation's prisons. Once again, there would be an iron curtain between prisoners and the courts with respect to basic human needs. Even a narrow affirmance of the decision of the Court of Appeals would jeopardize progress and create a pressure for the privatization of prison medical care for illegitimate reasons. For these reasons, the amici urge this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX I

> [O]ne inmate received a blow in the eye during a basketball game on April 28, 1978. Although he complained constantly, he was put off for one pretext or another until he was finally seen at Wishard Hospital on May 30, 1978, and a detached retina was found. He was operated on June 2, which was three weeks too late to save the eye. Another, who was taking penicillin for rheumatic heart disease when he entered the Reformatory, did not receive another prescription for 18 months. Another sought help for well over a year for a cough, severe chest pains, and difficulty in breathing. He received no help except cold medicine and cough drops from the medical technicians. He was finally referred to Wishard, where an operation disclosed a mass the size of a baseball in his right lung. Others have gone for months without detection of communicable tuberculosis.

French v. Owens, 538 F.Supp. 910, 918 (S.D.Ind. 1982), aff'd, 777 F.2d 1250 (7th Cir. 1985).

> Mr. Stubblefield first came to the prison infirmary at 3:00 PM on February 9, 1979, and complained of chest pains. His blood pressure and pulse were checked and he was sent back to

his cell. By 6:00 PM, Mr. Stubblefield returned to the infirmary again complaining of chest pain. He appeared to be in "severe distress" and had trouble breathing. PX 88. Nevertheless, no physician came to check on Stubblefield. A prison doctor was called by telephone and he prescribed a mild tranquilizer. Stubblefield was then admitted to the prison infirmary. By 7:30 PM, Stubblefield's blood pressure had dropped to 60/40 and his pulse was irregular. Plaintiffs' medical expert and defendants' medical expert agreed that Stubblefield "had suffered some type of cardiovascular catastrophe at that point." "He was in cardiovascular shock." Tr. at 2120, 2121. Still no doctor came to see Stubblefield. At 9:45 PM, Stubblefield's blood pressure was still only 60/40 and his pulse rate was up to 120 beats per minute. The infirmary progress notes state, "request [the doctor] to come in again and again he declined." PX 88. Finally, after four attempts to get [the doctor] to see Stubblefield, the infirmary called a second prison doctor. This doctor prescribed some medication for Stubblefield, though he did not order that Stubblefield be sent to the hospital until midnight, nine hours after Stubblefield had begun alerting the prison personnel to his chest pain... He died the following day.

Wellman v. Faulkner, 715 F.2d 269, 273-274

(7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984).

> One inmate, in otherwise excellent condition, suffered an appendicitis. After misdiagnosis and hours of delay before receiving competent attention, he was then delayed without any excuse at all, from being transported to the Colorado State Hospital. Transport was further interrupted and, upon arrival, adequate attention was not given until after the appendix ruptured and the inmate was placed in a life-threatening situation. The inmate was then transferred back to Old Max before he had adequately recovered and complications and further needless suffering ensued. Follow-up care was delayed and incompetent. Were it not for the fact that the inmate was previously in superb condition because of his training as a champion weightlifter, he might have died.
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> * * *
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> Another inmate came to the institution with a serious heart condition. Instead of being placed in the infirmary for direct observation and monitoring of his condition, he was placed in one of the cellhouses. He died before receiving medical attention.

Ramos v. Lamm, 485 F.Supp. 122, 143 (D.Col. 1979), aff'd in pert. part, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S.

104 (1981).

> Testimony has shown that inmate nurses often perform x-ray photography, conduct and interpret eye examinations, administer oral anesthesia, lance boils, and insert sutures. A few inmate nurses have regularly engaged in setting and casting broken bones, and one sutured heel tendons and performed a finger-tip amputation.
>
> Inmate nurses have also been instructed or permitted to make entries in their patients' charts. Deliberate falsifications in the charts are often made by these inmates; e.g., patients' liquid inputs and outputs have been improperly charted; spurious temperature readings have been inserted; and fictitious administrations of medication have been shown (some entries having been registered up to twenty-four hours before the medicines were supposedly dispensed).

* * *

While inmate nurses all too often improperly undertake treatment functions for which they are unqualified, the record reveals the irony that they have been reluctant to perform certain basic custodial duties. Grievous neglect of the personal care of patients at the HUH has resulted. Examples are numerous: on many occasions, routine preoperative

> enemas and urine bags were allowed to overflow (particularly on Monday morning, when no RN had been in the hospital all weekend); urine collections for urinalyses were either not accomplished or the specimens were not refrigerated, thus making them useless; intravenous solutions were allowed to run dry; bandages were not changed on time; incontinent inmates were allowed to lie in their own feces or urine for long periods; and inadequate hygienic care was administered to invalided patients generally. Decubitus ulcers (bedsores) were frequent among bedridden patients, as a result of the inattentive nursing. These open lesions are particularly troublesome at TDC, although they may usually be prevented simply by a systematic regimen of washing and turning the bedfast inmates.

Ruiz v. Estelle, 503 F.Supp. 1265, 1311-1312 (S.D.Tex. 1980), mod. on other grounds, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

> Both Dr. King and plaintiffs' expert, Dr. Whitney Addington, testified to the circumstances surrounding the tragic death of Mr. Willie Graham on June 15, 1975. Prior to commitment to the Department of Corrections, Graham was a chronic asthmatic who generally responded to traditional therapy associated with the treatment of asthma. Such treatment would include the use of bronchodialators; and in

particular, the use of epinephrine, subcutaneously, and aminophylline, intravenously, in the event of acute attack. The use of sedatives is contraindicated in the treatment of acute asthmatic patients and could cause ventilatory failure.

During this brief period of time Mr. Graham suffered recorded asthma attacks on at least fifteen occasions. His "treatment" was devised and carried out, for the most part, by unlicensed, untrained and unsupervised medical technicians and inmates, who without prior consultation with a physician, prescribed and administered a wide variety of medications, which could legally only be prescribed by a physician. Moreover, these medications were, in repeated instances, inappropriate, contraindicated, of insufficient dosage to be effective, in excessive dosages which may have resulted in toxicity; and, in eleven (11) occasions during recorded asthma attacks, aminophylline was given by intramuscular injection, a totally unrecognized, painful method of administration.

On the few instances when Graham was seen by a physician, Dr. Vidal, acceptable care was still not given. Medications that were at odds with acceptable practice were prescribed, necessary laboratory tests were not ordered, and proper documentation of physical findings was not made

in Graham's medical record. In addition, Dr. Vidal failed to terminate the intramuscular injections of aminophylline. Instead he verbally ordered, on June 13, 1975, that intravenous bronchodialators and inhalation therapy, the essential treatment for asthma, be denied and, instead substituted the administration of Sparine. This drug, a tranquillizer used in the treatment of psychosis, is a respiratory depressant which can cause respiratory failure in an asthmatic who is in or going into ventilatory failure.

Therefore, when Mr. Graham suffered an asthma attack on June 14th and June 15th, 1975, he was administered Sparine and use of intravenous bronchodialators were denied. At that point, carbon dioxide was building up and only a mechanical ventilator could save him. Instead, he was transferred to segregation on June 15, 1975, and died within hours in his cell.

* * *

Inmate Chester Graves died at the institution on February 3, 1976. Graves had been returned to the institution after having had a vein ligation. He was admitted to the institutional medical unit by a CMT at about 5:30 P.M. with swelling, shortness of breath, and chest pain. Graves died the following morning and was found to have had a

pulmonary embolism.

Dr. King concluded that in this instance, the CMT was clearly unable to make a simple diagnosis of "classic symptoms" on the night of admission and that a person of appropriate skill would have sent this man immediately to a full-service hospital where he would have received an anti-coagulant. King stated that cases like Graves indicated that high level of skill and judgment is required at Menard during the night-time hours. At the close of trial, there was not even a registered nurse at the institution at night.

Mr. Kenneth Daugherty died at Menard on April 15, 1976. Dr. King, on August 31, 1977, reviewed his medical records at trial concluding that Daugherty's life may have been saved if qualified personnel had been available to interpret an E.K.G. and physical symptoms which clearly suggested the ultimate cause of death. King testified that the records indicated: the delegation of responsibility for medical care to an unlicensed, unqualified person; the lack of an emergency medical system; the lack of procedures for transferring a patient to another facility for proper monitoring of his condition; and lack of medical audit procedures. In this last regard, King stated that the CMT involved in this case should have been reprimanded by his superiors and

that Dr. King would not have retained this CMT in his own system in view of the CMT's conduct in this case.

Inmate Hansen died at the institution on June 22, 1977. This inmate's case was reviewed at trial by Dr. King. The panel had noted in their second report that the defibrillator at the institution was designed for pediatric use and was inadequate for treating a large size adult. King testified that Hansen was a large man of 240 pounds and that the unit at Menard was not able to generate enough power to perform defibrillation on a man of this size. Medical records indicate several unsuccessful attempts to cardiovert the patient with the defibrillator. King stated that an adequate unit might have saved his life.

Lightfoot v. Walker, 486 F.Supp. 504, 519-520 (S.D.Ill. 1980).

APPENDIX II

Amici surveyed the relevant statutes of the fifty states. Only one state by statute allows any prisoner to choose a medical care provider: LOUISIANA- La.Rev.Stat.Ann. §15:860 (West 1981). Most departments of corrections assume the responsibility for medical care of all prisoners: ALABAMA - Ala. Code §§ 14-1-8, 14-1-12 (1975); ALASKA - Alaska Stat. §§ 33.30.011, 33.30.100, 33.30.121 (1986); ARIZONA - Ariz.Rev.Stat.Ann. §§ 31-201.01, 41-1604, 41-1604.01 (1985); ARKANSAS- Ark.Stat.Ann. §46-150 (1977); CALIFORNIA- Cal. Penal Code §§ 6125 et seq., (Deering 1982); COLORADO - Col.Rev.Stat. §§ 23-21-110, 17-1-103 (1986); CONNECTICUT- Conn.Gen.Stat.Ann. §§ 18-81, 18-1019 (West 1975); DELAWARE - Del. Code Ann.tit.11, §6536 (1979); FLORIDA - Fla.Stat.Ann. §§ 945.12, 945.601, 945.603 945.6035 (West 1987); GEORGIA - Ga. Code Ann. §42-5-2 (1985); HAWAII - Hawaii Rev.Stat. §§ 353-6, 353-10 (1976); IDAHO - Idaho Code §§ 20-209, 20-501 (1979); ILLINOIS- Ill.Rev.Stat.Ch. 38, §§ 1003-6-2, 1003-7-2, 1003-8-2, 1003-11-1, 1003-13-2 (1982); INDIANA - Ind. Code Ann. §§ 11-10-3-2, 11-10-3-4 (West 1981); IOWA - Iowa Code §217A.2 (1987); KANSAS - Kan.Stat.Ann. §§ 75-5209, 75-5210 (1977); KENTUCKY- Ky.Rev.Stat.Ann. §§ 196.030, 197.020, 211.920, 211.925, 439.600 (Bobbs-Merrill 1985); LOUISIANA - La.Rev.Stat.Ann. §§ 15:827, 15:831, 15:833, 15:860 (West 1981); MAINE - Me.Rev.Stat.Ann.tit.34, §§ 7, 134, 631; tit.34-A, §§ 3031, 3235 (1978); MARYLAND - Md.Ann. Code art.27, §698 (1982); MASSACHUSETTS - Mass.Gen. Laws Ann.Ch.27 §2; Ch.125 §18; Ch.127 §§ 16, 39,

90A, 117, 117A, 118 (West 1984); MICHIGAN- Mich.Comp. Laws Ann. §§ 791.265, 791.265b (1982); MINNESOTA - Minn.Stat.Ann. §244.07 (West 1987); MISSISSIPPI - Miss. Code Ann. §§ 47-5-112, 47-5-120 (1987); MISSOURI- Mo.Ann.Stat. §§ 217.230, 217.375, 217.420, 217.425 (Vernon 1983); MONTANA - Mont. Code Ann. §53-1-204 (1986); NEBRASKA- Neb.Rev.Stat. §83-181 (1981); NEVADA- Nev.Rev.Stat. §§ 209.331, 209.381, 209.382 (1985); NEW HAMPSHIRE - N.H.Rev.Stat.Ann. §§ 21-H:3, 21-H:13, 623.1 (1986); NEW JERSEY - N.J.Stat.Ann. §§ 30:4-7, 30:4-7.1, 30:4-7.2, 30:4-7.3, 30:4-91.3 (West 1981); NEW MEXICO - N.M.Stat.Ann. §§ 33-2-13, 33-2-16 (1986); NEW YORK - N.Y. Correction Law §§ 23, 47, 141, 851, 852 (McKinney 1987); NORTH CAROLINA -N.C.Gen.Stat. §§ 148-4, 148-19, 148-22.2, 148-46.2 (1983); NORTH DAKOTA - N.D.Cent. Code §§ 12-47-27, 23-07-08 (1985); OHIO - Ohio Rev. Code Ann. §§ 5120.16, 5145.23 (Baldwin 1981); OKLAHOMA- Okla.Stat.Ann.tit.43A §701; tit.57 §§ 38, 57, 224, 530 (West 1987); OREGON- Or.Rev.Stat.Ann. §§ 179.360, 179.479, 179.490 (1985); PENNSYLVANIA - 37 Pa.Admin. Code §93.12 (Shepard's 1987); RHODE ISLAND- R.I.Gen. Laws §§ 40-2-12, 40-2-14, 40.1-2-16, 40.1-2-19, 42-56-1, 42-56-3, 42-56-10, 42-56-16, 42-56-18, 42-56-20 (1977); SOUTH CAROLINA - S.C. Code Ann. §§ 24-1-130, 24-3-160, 24-3-210 (Law Co-op. 1986); SOUTH DAKOTA - S.D. Codified Laws Ann. §24-2-4 (1979); TENNESSEE - Tenn. Code Ann. §§ 4-6-109, 41-21-203, 41-21-204 (1979); TEXAS - Tex.Rev.Civ.Stat.Ann.arts. 6166g, 6203c; UTAH - Utah Code Ann. §§ 64-13-25, 64-13-26, 64-13-34, 77-34-1, 77-34-2, 77-34-3 (1986); VERMONT- Vt.Stat.Ann.tit.3, §262; tit.28, §§ 801, 808 (West 1986); VIRGINIA - Va. Code §§ 53.1-32, 53.1-33, 53.1-34 (1982); WASHINGTON - Wash.Rev. Code Ann. §§ 72.09.040, 72.09.050, 72.13.080, 72.66.018

(1982); WEST VIRGINIA - W.Va. Code §25-1-16 (1986); WISCONSIN - Wis.Stat.Ann. §53.10 (West 1957). Only one state code does not mention any specific responsibility for the medical care of prisoners: WYOMING - Wyo.Stat.Ann. (1986).

No. 87-5096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

QUINCY WEST,

Petitioner,

VS.

SAMUEL ATKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE
BRIEF OF AMICUS CURIAE

The American Public Health Association ("APHA") moves pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States for leave to file a brief amicus curiae in support of petitioner. The written consent of petitioner has been filed with the Court. Although respondent has advised APHA that he does not oppose

the filing of the brief, he has not provided written consent.

APHA is a national non-governmental organization established in 1872 for the purpose of improving the quality of public health. Together with its affiliates, APHA is the largest public health association in the world, with a combined multidisciplinary membership of approximately 50,000 health care professionals and consumers. APHA has appeared before this Court on numerous occasions as amicus curiae in cases with serious implications for the public health. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Hardwick v. Bowers, ___ U.S. ___, 106 S.Ct. 2841 (1986).

APHA has a special interest in assuring adequate health care for underserved segments of society. In the early 1970's, when the concept of furnishing appropriately comprehensive health services to inmates was controversial, APHA appointed a task force to devise standards for health care in prisons and jails. The resulting publication, Standards for Health Care in Correctional Institutions, the first document of its kind, appeared in print in 1976.[1]

Because of its broad knowledge of the problems of prison medical care, APHA believes it will present to the Court a valuable perspective on the issues that this case presents, including the role of health staff in correctional facilities and the application in injunctive suits of the "deliberate indifference" standard of Estelle v. Gamble, 429 U.S. 97 (1976).

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[1] A new, revised edition of these standards is lodged with the Clerk of Court. Standards for Health Services in Correctional Institutions (2d ed. 1986).

Consistent with its purpose of advancing the public health and in the hope of decreasing the human suffering caused by unconstitutional care, APHA requests leave to file this brief.

Respectfully submitted,

/S/
William J. Rold

Dated: December 10, 1987
New York, New York

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INTEREST OF AMICUS CURIAE
AMERICAN PUBLIC HEALTH ASSOCIATION

The interests of the American Public Health Association (APHA) are set forth in its motion for leave to file this brief as amicus curiae, which is bound herewith pursuant to Rule 36.3 of the Rules of this Court. APHA has lodged with the Clerk of Court a copy of its recent Standards for

Health Services in Correctional Institutions.[1]

SUMMARY OF ARGUMENT

The court below erred in holding that prison medical practitioners do not act under color of state law. The court incorrectly assumed that, "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." West v. Atkins, 815 F.2d 993, 995 (4th Cir. 1987). In reality, the prison's nature as a closed "total institution" constrains the medical discretion of even the most independent physician in numerous and inescapable ways; and many of the customary

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[1] See Standards for Health Services in Correctional Institutions (2d ed. 1986) [hereinafter "APHA Standards"].

safeguards, such as accreditation and peer review, that reinforce adherence to medical standards are absent.

The court also falsely assumed that prison doctors lack "custodial or supervisory" responsibility, id.; in fact, such responsibility pervades prison medical practice. Thus, this case is not governed by Polk County v. Dodson, 454 U.S. 312 (1981), in which the Court held that a public defender representing a client did not act under color of state law because of the adversary nature of the criminal process and the defender's nearly unqualified obligation to act in her client's interest. By contrast, the prison medical practitioner is engaged in carrying out the state's purposes as much as the prisoner's.

Federal court litigation has been essential to the development of minimally

decent medical care in prisons and jails, and the continued availability of the federal forum is essential to preserving and extending this progress. Such litigation has not improperly invaded medical discretion or professional judgment, which is protected by the established legal standard requiring that prisoners prove "deliberate indifference" in order to state a constitutional claim. Estelle v. Gamble, 429 U.S. 97 (1976). Medical malpractice is not litigable under 42 U.S.C. § 1983; the federal courts review only claims of outright denial of care, extreme or abusive behavior, failure to exercise medical judgment, or failure to act on medical orders once they have been written. In injunctive cases, litigation has enhanced the autonomy of medical personnel by assuring the resources necessary for exercise of professional judgment.

Adoption of a "color of law" rule that broadly excludes prison medical staff as parties in civil rights cases would remove from federal scrutiny the activities of those persons who, by training and responsibility, are in the best position to assure that constitutionally adequate care is provided. Moreover, their exclusion would result in medical care injunctions running only against wardens and other lay personnel, who cannot realistically supervise medical staff, and whose attempts to do so could jeopardize their professional autonomy.

Health care practitioners should be deemed to act under color of state law when they treat inmates more than occasionally in a setting that is demonstrably correctional or under circumstances that substantially d.stinguish the prisoner-patient from other patients

served. The employment status of the practitioner should not be determinative; contractual and part-time physicians as well as full-time prison employees may be subject to the constraints of prison practice. The proposed standard lends itself to the "necessarily fact-bound inquiry" prescribed by this Court, Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982), and acknowledges that "differences in circumstances beget differences in law...." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974).

ARGUMENT

I. PRISONS AND JAILS, AMONG THE MOST HIGHLY STRUCTURED OF BUREAUCRACIES, SO INFLUENCE MEDICAL AUTONOMY THAT PROFESSIONAL INDEPENDENCE WITHIN THE MEANING OF POLK COUNTY v. DODSON **CAN BE NEITHER ASSUMED NOR ASSURED.**

The court below adopted a state action test that assumes that prison medical staff exercise the same professional

independence as their free world counterparts. Its sweeping statement that, "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured," West v. Atkins, 815 F.2d at 995, ignores both the realities of the correctional setting and the substantial body of literature showing that medical professionals in institutions, and in prisons particularly, have limited independence and often become entangled in non-health concerns.

It is APHA's experience that the care delivered by institutional physicians is greatly influenced by the organization in which they find themselves.[2]

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[2] Physicians' training has been repeatedly shown to affect their performance less than does the site of their practice. Palmer & Reilly, "Individual and Institutional Variables Which May Serve as Indicators of Quality of Medical Care," 17 Medical Care 693, 699 (1979). Indeed,

Bureaucracies "subjugat[e]... professional standards to administrative consideration in the decision-making process,"[3] foster-

(footnote cont'd)

very different treatment is provided by the same physicians when they practice in municipal rather than voluntary hospitals. See Mates & Sidel, "Quality Assessment by Process and Outcome Methods: Evaluation of Emergency Room Care of Asthmatic Adults," 71 Am. J. Public Health 687-690 (1981); Rubenstein, et al., "Quality-of-Care Assessment by Process and Outcome Scoring: Use of Weighted Algorithmic Assessment Criteria for Evaluation of Emergency Room Care of Women with Symptoms of Urinary Tract Infection," 86 Annals Int. Med. 617 (1977).

[3] Lichtenstein, "A Classification of Prison Health Systems based on Their Bureaucratic Attributes," 3 J. of Prison & Jail Health 40, 43 (1983), quoting Blau, "The Hierarchy of Authority in Organizations," in Heydebrand (ed.), Comparative Organizations: The Results of Empirical Research, Englewood Cliffs, N.J.: Prentice-Hall (1973). Accord, Engel, "The Effect of Bureaucracy on the Professional Autonomy of the Physician," 10 J. of Health & Soc. Behavior 30 (1969) (literature suggests that bureaucracy restricts the professional's freedom, makes him dependent on the organization, and "inhibits the application of his knowledge and skills"); Hall, "Professionalization and Bureaucratization," 33 Am. Soc. Rev. 92, 103 (1968) (inverse relationship

ing in professionals a "lack [of] autonomy which is vital for successful performance."[4]

This process is particularly powerful in "total institutions" such as prisons and jails that, by design and in practice, are removed from the community and operated to emphasize their separation from all aspects of the outside world,[5] including community norms of delivering health care. The strong institutional and historical factors peculiar to prisons

(footnote cont'd)

between professionalism and bureaucratization).

[4] Engel, supra n.3, at 30.

[5] Twaddle, "Utilization of Medical Services by a Captive Population: An Analysis of Sick Call in a State Prison," 17 J. of Health & Soc. Beh. 236, 237 (1976); see also Goffman, Asylums at 4 (1961); Ingraham v. Wright, 430 U.S. 651, 669-70 (1977).

affect the practice of medicine and constrain the choices made by health practitioners to such an extent that it cannot be assumed that a physician practicing in this setting can meet community expectations of professional independence.

A. Administrative and Security Imperatives Affect the Exercise of Medical Judgment in a Prison.

Prisons and jails are inherently coercive institutions that for security reasons must exercise nearly total control over their residents' lives and the activities within their confines. Prison health care professionals work in a "medically alien setting"[6] to which their formal training provides no orientation. The experience changes the way medical staff exercise professional judgment.

In an institution, "[t]he general schedules that strictly regulate work, exercise, and diet necessarily collide with individual medical orders for treatment."[7] No prison physician will be unaffected by the burdens posed on the administration of the prison or jail with each medical order that requires deviation from the standard institutional regimen. The practitioner will necessarily weigh a patient's medical need for special clothing, a special diet, an extra shower, a

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[6] Wishart & Dubler, Health Care in Prisons, Jails and Detention Centers: Some Legal and Ethical Dilemmas, Curriculum Materials Developed under a Grant from the National Science Foundation at 16 (1983). A copy of these materials is lodged with the Clerk of Court. See also Brecher & Della Penna, Health Care in Correctional Institutions at 69 (Department of Justice, Law Enforcement Assistance

(footnote cont'd)

Administration 1975).

[7] Neisser, "Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care," 83 Va. L. Rev. 921, 944 (1977).

permit for a cane, or more frequent access to exercise equipment against the administrative difficulty of deviating from the normal rules and the effect granting such an exception may have on other patients who might seek similar treatment or the institution's willingness to accede to such exceptions in the future.

Correctional institutions impose unusual constraints on the delivery of medical services. Prescribing drugs poses unique problems in corrections because many medications are valuable in the inmate economy.[8] As a result, physicians

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[8] See National Commission on Correctional Health Care, Standards for Health Services in Jails (1987) [hereinafter "NCCHC Standards J-__"] and Standards for Health Services in Prisons (1987) [hereinafter "NCCHC Standards P-__"], at J-22 and P-21. Copies of these standards are lodged with the Clerk of Court. The APHA Standards advise keeping use of controlled medications to a "minimum." APHA Standards, supra n.1, at Part 9; see also Part 5, Standard A.

who prescribe medications in prison by the same standards used for civilian patients may soon be in conflict with the prison administration,[9] leading some doctors to see themselves as "guardians of medication."[10]

Conversely, in some prisons and jails, drugs have been prescribed for institutional convenience rather than medical reasons. They have been used as substitutes for physical restraint,[11] as

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[9] Rundle, "Institution vs. Ethics: The Dilemma of a Prison Doctor," The Humanist 26, 27 (May-June 1972).

[10] Comment, "Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?" 27 A.U.L. Rev. 92, 122 n.154 (1977), citing Rundle, "Medical Uncare for Prisoners," 1 Prisoners' Rights Newsletter 53, 54 (1971).

[11] Forer, "Medical Services in Prisons: Rights and Remedies," 68 A.B.A. Journal 563 (May 1982).

"pacifiers" in a tense and understaffed environment,[12] and even as punishment for violation of prison rules,[13] despite professional standards condemning such practices.[14]

More generally, inmates cannot self-treat such minor ailments as headaches, upset stomachs, or colds; nor may they just stay in bed when they feel ill. Such common items as aspirin, dental floss, antacids, and band-aids typically must be obtained from the prison's medical staff.

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12 Brazier, "Prison Doctors and Their Involuntary Patients," 1982 Pub. L. 282, 296-7 (1982).

13 See, e.g., Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (emetic drug); Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (paralytic drug); see also Note, "Aversion Therapy: Punishment As Treatment and Treatment as Cruel and Unusual Punishment," 49 So. Cal. L. Rev. 880 (1976).

14 NCCHC Standards, supra, n.8, J-30.d.viii and P-29.e.viii.

Thus, prisoners must seek medical assistance even if all they need is an over-the-counter remedy or a day in bed.[15]

Such prison rules, adopted for non-medical administrative reasons, greatly enlarge the demands on medical staff, fostering a tendency to characterize patients as exaggerators or malingerers.[16] For the prisoner, the normal doctor-patient association becomes a "continuing adversary relationship with those who con-

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15 See Todaro v. Ward, 431 F.Supp. 1129, 1133 (S.D.N.Y.), aff'd, 565 F.2d 48 (2d Cir. 1977).

16 Nathan, "Guest Editorial," 5 J. of Prison & Jail Health 3, 7-9 (1985). Mr. Nathan, who has served as a special master for federal district judges in Ohio, Georgia, Texas, and New Mexico, notes that the danger of minimizing the complaints of prisoner-patients is very real: "The death records maintained in prisons throughout this country provide eloquent, if mute, evidence of malingerers whose fabricated complaints proved to be fatal." Id. at 9.

trol his everyday needs."[17]

The institutional environment produces continual pressure to tailor the quality and quantity of medical treatment to demands of institutional security, productivity, discipline, and administrative convenience.[18] Even health professionals whose contact with the correctional system is limited are subject to pervasive influence. The authors of a recent correctional health journal article recommend that prisons write a "briefing sheet" for consultants that details "which procedures or medicines can and cannot be

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17 Twaddle, supra n.5, at 245. The peculiarities of the doctor-patient relationship in corrections and concern over past abuses has resulted in federal restrictions on using prisoners as subjects in behavioral and biomedical research. See 21 C.F.R. §§ 50.40-.48 (1987); 28 C.F.R. §§ 512.10-.22 (1987); 45 C.F.R. §§ 46.301-.306 (1985).

18 Nathan, supra n.16, at 11.

done or given at the institution," as well as "other rules and procedures peculiar to the institution."[19] They also offer consultants the following specific advice:

- Keep a therapeutic regimen as simple as possible.
- Avoid prescribing "exotic" medication or "non-essential" diets.
- Specify follow-up care that is within the capability of the institutional staff.
- Do not reveal future medical appointment dates to the patient.
- Recognize the "enormous amount of time and resources" involved in movement of a prisoner when scheduling return visits.
- Understand that security must be considered "an integral part of any consultative effort."
- Remember that "a sign of an escaper can be a request for a repeat visit to a consultant."
- Do not "berate[] prior care from the institution" in front of the patient.
- Be "certain and positive" lest uncertainty lead to litigation.[20]

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19 Lessenger & Bader, "Medical Consultation for Correctional Institutions," 4 J. of Prison & Jail Health 96, 104 (1984).

20 Id. at 99, 104-5.

Such institutional influence means that health staff will be under constant pressure not to exercise the discretionary functions nominally delegated to them. Sometimes, correctional influence is overt;[21] at other times, it is more subtle, fostering a "less obvious and perhaps subconscious deference" by health staff.[22] In all cases, it is present. Such considerations impinge upon the professional judgment of the health care employee in a way not encountered in the free community.

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21 "The risk of retaliation for the medical professional who dares to intrude on the turf of the deputy warden for operations is very real...." Nathan, supra n.16, at 10. Brecher and Della Penna, supra n.6, at 69, warn that a medical director "should avoid such a conflict at almost any cost."

22 Neisser, supra n.7, at 960.

B. Medical Staff Are Entangled in Non-medical Custodial and Supervisory Functions.

The Fourth Circuit, by characterizing the services of prison medical staff and consultants as wholly separate from custodial and supervisory functions, West v. Atkins, 815 F.2d at 995, citing Polk County v. Dodson, 454 U.S. at 320, ignored the realities of prison management. Commonly, health care employees are inextricably entangled in activities concerning the daily operation of the institution in a manner not expected of them in the free world. The prison or jail may depend upon health staff to certify the adequacy of food services, or the sanitation, waste disposal and hygiene systems. Their recommendations affect institutional, job, housing, and programmatic assignments,[23] and in some cases

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23 APHA Standards, supra n.1, Part 7,

will substitute for an adequate classification system.[24]

Health staff also assist the institution in ways that are directly adverse or

(footnote cont'd)

Standard C.3; NCCHC Standards, supra n.8, J-08 and P-08; see also Neisser, supra n.7, at 958-9. Contrary to rules of patient confidentiality in the free community, the sharing of patient information in corrections may be expected or required. Wishart & Dubler, supra n.6, at 17; American Correctional Association, Standards for Adult Correctional Institutions (2d ed. 1981) [hereinafter "ACA Prison Standards"], Standard 2-4319, and Standards for Adult Local Detention Facilities (2d ed. 1981) [hereinafter "ACA Jail Standards"], Standard 2-5291. For an account of a physician fired for refusing to turn over a confidential psychiatric file of a patient under his care, see Rundle, supra n.9, at 26.

[24] Nathan, supra n.16, at 7. In North Carolina, health staff are directed to indicate assignment limitations for inmates so that the warden can place them in an appropriate work assignment. State of North Carolina, Division of Prisons, Health Care Procedure Manual (May 1980) [hereinafter "N.C. Prison Health Manual"], ¶ 219.2.

coercive toward their patients, such as conducting body cavity searches or other procedures to gather forensic evidence for disciplinary proceedings,[25] documenting the consequences of use of force by staff,[26] and authorizing placement or retention of inmates in solitary confinement[27] or in physical restraints.[28]

[25] United States v. Caldwell, 750 F.2d 341, 344-5 (5th Cir. 1984), cert. denied, 471 U.S. 1007 (1985); NCCHC Standards, supra, n.8, J-11 and P-11; Wishart & Dubler, supra n.6, at 102; N.C. Prison Health Manual, ¶ 704.2. The APHA Standards, supra n.1, Part 13, Standard C at 112-3, condemn this practice.

[26] See City of New York, Department of Correction, Directive 5002R (September 16, 1987) at 3, 21 (examinations after use of force "do more than provide any medical attention that is required... [they are] essential to disproving unfounded force allegations..."; APHA Standards, supra, n.1, Part 13, Standard C, condemn such use of medical staff.

[27] NCCHC Standards, supra, n.8, P-50, J-60, P-60. Such monitoring may include an assessment of the effects of deprivation of bedding or the imposition of a diet of "short rations." See APHA Standards, supra, n.1, Part 8, Standard E.2 (bed-

Indeed, health staff may be asked to participate in the administration of the penalty of death or to render an opinion as to the competency of a prisoner for execution.[29]

This involvement of medical staff in custodial and disciplinary functions, although condemned by national standards,[30] is widespead in the experi-

(footnote cont'd)

ding); N.Y. Correc. Law § 137.6(c) (McKinney Supp. 1987) (diets). The New York statute requires health staff to monitor inmates receiving a restricted diet for disciplinary reasons and to make recommendations about its continuation.

[28] APHA Standards, supra, n.1, Part 3 at 27-8 and Part 5, Standard C; NCCHC Standards J-60 and P-60. (The APHA Standards ban the use of disciplinary restraints.)

[29] APHA Standards, supra, n.1, Part 13, Standard D, condemn such involvement.

[30] Id., Part 13, Standard C.

ence of APHA. Indeed, it is sometimes required by statute or regulation.[31] The effect is destructive of the professional relationship between provider and patient and engenders widespead distrust.

> No individual, however skilled an compassionate a doctor, can maintain a normal doctor-patient relationship with a man whom the next day he may acquiesce in subjecting to solitary confinement.[32]

C. Scarcity of Resources Impinges on the Professional Judgments of Practitioners in Corrections to an Extent Absent in the Free World.

Prison medical care is constrained by severe limitations of resources, both medical and correctional,[33] that

[31] See N.Y. Correc. Law § 137.6(c) (McKinney Supp. 1987); 28 C.F.R. § 552.11(c) (1987); see also n.27, supra.

[32] Brazier, supra n.12, at 285.

[33] See, generally, Comptroller General, Report to the Congress: A Federal Strategy Is Needed to Help Improve Medical and Dental Care in Prisons and Jails (Dec. 22, 1978).

inevitably shape the way medical judgments are made. To cope with high patient demand, limited resources, and the difficulty of operating in a tightly controlled environment, medical units often adopt "administratively convenient measures that deny patients access to individual medical judgments."[34] In Todaro v. Ward, 431 F. Supp. at 1143-46, for example, in a system found to be unconstitutional, overworked nurses merely collected the names of patients requesting sick call and decided later, on the basis of little or no actual information about the patients' medical complaints, which few would see the doctor.

There are many other ways in which

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[34] Neisser, supra n.7, at 959.

the exercise of medical judgment has been impaired, constrained, or rendered nominal by such non-medical considerations. Medical personnel respond to unmanageable waiting lists by categorically omitting patients seen recently, those repeating the same complaint, or those with a specified group of symptoms.[35] Alternatively, all patients are given the same palliative treatment, such as pain-killing medication, without individual diagnoses.[36] In some cases, medical services degenerate to a "care-on-demand" system in which inadequate medical resources are devoted primarily to those who complain the loudest or can best manipulate the system.[37]

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[35] See id. at 968.

[36] Estelle v. Gamble, 429 U.S. at 110 (Stevens, J., dissenting); see also Neisser, supra n.7, at 959.

[37] Conte, "Dental Treatment for Incar-

Physicians delay trips to outside specialists because of shortages in escort staff or vehicles. Needed surgery is postponed in all but life-threatening cases as patients compete for limited secure bed space or await the availability of guards.[38] Admissions to the prison infirmary are curtailed when the overcrowded prison houses healthy inmates there.[39] There is pressure to adjust the normal frequency of medication dispensing to conform to limited pharmacy hours, staff shift changes, or other prison activities.[40] Inmates needing supervised post-operative physical therapy are told simply to exercise in their cells, and those for whom root canal therapy would save natural teeth are offered only extraction.

(footnote cont'd)

cerated Individuals: For Whom? How Much?" 3 J. of Prison & Jail Health 25, 26 (1983); Dean v. Coughlin, 623 F. Supp. 392, 396 (S.D.N.Y. 1985); see Winner, "An Introduction to the Constitutional Law of Prison Medical Care," 1 J. of Prison Health, 67, 70-1 (1981) (system that fails to distinguish between patients needing prompt care and those who can wait is inadequate).

38 See Neisser, supra n.7, at 960.

39 Anderson v. Redman, 429 F. Supp. 1105, 1120-21 (D. Del. 1977); cf. Williams v. Edwards, 547 F.2d 1206, 1217 (5th Cir. 1977) (whirlpool bath for physiotherapy used by kitchen to keep fish fresh).

D. The Safeguards that Reinforce Adherence to Medical Standards of Judgment in the Community Are Weakest in the Correctional Setting.

In the larger society, there are safeguards within the medical community that reinforce appropriate norms of sound practice, but they tend to be absent or weak in corrections, rendering prison medical practitioners particularly suscep-

40 See Neisser, supra n.7, at 960.

tible to inappropriate influence on the exercise of medical judgment.

One important safeguard of standards in medicine is the continuing association with a variety of fellow practitioners through referrals, work in civilian hospitals, and membership in professional associations. This collegiality is often absent in corrections because, historically, prison health care has been isolated from the larger community.[41]

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[41] Recognition that isolation calls for outside scrutiny of prisons and their health care systems is reflected in such early statutes as the English Coroner's Acts of 1887 and 1926, requiring investigation by inquest of "all sudden, violent, or unnatural deaths, and the deaths of people in prison" whether "natural or not." Shapiro, "Forensic Medicine: Legal Responses to Medical Developments," 22 N.Y.L.S.L. Rev. 905, 908 (1977), citing Thurston, "The Coroner's Limitations," 30 Med.-Legal J. 110, 111 (1962). As of 1986, at least twenty-six states had statutes requiring or authorizing autopsies for prison deaths. Note, "Experimentation on Prisoners' Remains," 24 Am. Crim. L. Rev. 165, 176 n.58 (1986).

Until recently, most professionals have ignored this area of health care,[42] in large part because of the low salaries and social stigma associated with prisons. In addition, many institutions are located in remote rural places, far from medical libraries or tertiary care centers.

Not surprisingly, prisons have experienced enormous difficulties in recruiting and retaining qualified medical personnel.[43] Many physicians in prison health programs have been unlicensed[44] or

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[42] Lindenauer & Harness, "Care as Part of the Cure: A Historical Overview of Correctional Health Care," 1 J. of Prison Health 56 (1981).

[43] Neisser, supra n.7, at 937; see also Brecher & Della Penna, supra n.6, at 17.

[44] The Comptroller General's Report in 1978, supra n.33, at 7, 18, and 21, found reliance upon unlicensed doctors in one-fourth of the institutions studied. Some of the physicians could hardly speak English -- a problem that persists. See Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984).

those who, for a variety of reasons, have been unable to secure employment elsewhere.[45] Although non-binding national standards now require licensure,[46] statutes that allow institutional practice by physicians who would not be permitted to work in the free world remain on the books in several states.[47]

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[45] Wishart & Dubler, supra n.6, at 36; Neisser, supra n.7, at 937.

[46] NCCHC Standards, supra n.8, J-15 and P-15; APHA Standards, supra n.1, Part 12 at 106; ACA Prison Standards, supra n.23, Standards 2-4283, 2-4284, 2-4295; ACA Jail Standards, supra n.23, Standards 2-5270, 2-5277; American Medical Association, Standards for Health Services in Jails, Standard 117 (1981).

[47] See Ala. Code § 34-24-75(c) (1985); Colo. Rev. Stat. § 17-1-101 (1986); Ga. Code Ann. § 43-34-33 (1984); Miss. Code Ann. § 73-25-23 (Supp. 1987); Okla. Stat. Ann. tit. 59, § 489.1 (West Supp. 1987). The Georgia statute explicitly provides that the granting of an institutional license "shall not be prima-facie evidence that the holder thereof meets the minimum basic requirements for examination by the board or for the issuance of a permanent license to practice medicine."

Most prison medical care delivery systems are not subject to the standard-setting mechanism of accreditation. In the free community, significant incentives for accreditation exist that are absent in corrections.[48] Indeed, most prison systems have downgraded their hospitals to infirmaries rather than meet accreditation standards.[49] Today, the vast majority of

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[48] Accredited hospitals are deemed to be in compliance with a number of requirements for participation in the Medicare program, 42 U.S.C. § 1395bb (1983 and Supp. 1987), and may, through accreditation, be eligible for intern and resident training and lower liability insurance premiums. Dornette, "The Legal Impact of Voluntary Standards in Civil Actions Against the Health Care Provider," 22 N.Y.L.S.L. Rev. 925, 927-8 (1977).

[49] Comptroller General's Report, supra n.33, at 7.

prisons and jails in the United States remain unaccredited.[50]

Meaningful peer review, a key factor in maintaining professional standards, is not available in most prisons and jails. PSRO's (Professional Standards Review Organizations) that assume standard-setting and review responsibility over both practitioners and hospitals[51] are

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[50] Of the more than four thousand prisons and jails in the United States, Department of Justice, Report to the Nation on Crime and Justice: The Data, at 78-9 (1983), only 258 were accredited as of October 1986. National Commission on Correctional Health Care, "Report of the Accreditation Committee," Attachment A (May 2, 1987).

[51] PSRO's are required under federal law for monitoring medical services for which payment is made under the Social Security Act. 42 U.S.C. § 1320c, et seq. (1983 and Supp. 1987). Medicaid, the primary federal assistance for the health care needs of America's non-elderly indigent, is unavailable to prisoners, 42 U.S.C. §1396d (Supp. 1987).

virtually unknown in corrections.

Additional mechanisms that might be thought to help reinforce professional standards in the prison setting are, realistically, of marginal impact. The efficacy of professional grievance and disciplinary committees has been seriously questioned even in civilian life,[52] and there is slight cause to believe that they respond effectively (or even seriously) to prisoner complaints.[53] Similarly, mal-practice actions[54] are widely recognized

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[52] Derbyshire, "Medical Ethics and Discipline," 228 J.A.M.A. 59, 61 (1974), cited in Grad, "Medical Malpractice and the Crisis of Insurance Availability: The Waning Options," 36 Case West. L. Rev. 1058, 1065-6 (1986); Brook, "The Relationship Between Medical Malpractice and Quality of Care," 1975 Duke L. J. 1197, 1216 (1975).

[53] Neisser, supra n.7, at 957 n.141.

[54] While a state malpractice remedy is theoretically available to inmates, they face various obstacles in bringing such cases. See Comment, "Inadequate Medical Treatment of State Prisoners," supra n.10,

to have little effect on the behavior of medical practitioners.[55]

Finally, because the doctor-patient relationship in a correctional facility is imposed by the state, the dissatisfied patient is not free to select a different provider. This absence of freedom of choice removes the "competitive quality controls" of the market place that normally influence the behavior of physicians.[56]

Thus, in a correctional institution, the protections afforded unconfined

(footnote cont'd)

at 116-119.

55 Grad, supra n.52, at 1067 n.39; Wiley, "The Impact of Judicial Decisions on Professional Conduct: An Empirical Study," 55 So. Cal. L. Rev. 345, 384-5 (1981).

56 Neisser, supra n.7, at 938; see also Brecher & Della Penna, supra n.6, at 69.

patients are replaced by institutional imperatives. The unavailability of professional standard-setting mechanisms guarantees the continuing presence of some health practitioners least able or willing to exercise the professional judgment that the court of appeals erroneously assumed is present in all cases.

II. BECAUSE PRISON MEDICAL CARE LITIGATION HAS RESULTED IN ENORMOUS PUBLIC HEALTH BENEFITS AND SINCE EXISTING LAW FULLY PROTECTS PROFESSIONAL MEDICAL JUDGMENT, THE COURT SHOULD NOT ADOPT A "COLOR OF LAW" STANDARD THAT UNDULY OBSTRUCTS THE LITIGATION OF SUBSTANTIAL EIGHTH AMENDMENT CLAIMS.

APHA agrees that the genuine exercise of professional discretion is not, and should not be, actionable under § 1983. Because such independence in prison medical care is sometimes illusory and usually precarious, however, the Court should not adopt the Fourth Circuit's "color of law" rule that assumes its existence in all

cases.

Fifteen years of prison health care litigation has fostered substantial benefit to a traditionally underserved population and to the general public. This has been accomplished without infringing upon the protected sphere of professional autonomy because the substantive Eighth Amendment standard for such claims insulates professional medical judgment from federal court review. See Estelle v. Gamble, supra.

The success of the litigation has depended in large part on the well-established view that prison medical staff act under color of state law. A "color of law" rule that broadly excludes such staff from the scope of § 1983 would seriously impair the enforcement of prisoners' constitutional right to minimally decent medical care.

A. Federal Court Prison Medical Care Litigation Has Substantially Improved the Public Health, and its Continued Availability Is Essential.

In the view of the APHA, the federal court remedy under Estelle v. Gamble has fostered major improvements in the medical care of prisoners in the United States.[57] The prison cases are replete with accounts

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[57] Informed observers agree. A special master in a number of complex prison class actions has written: "No serious student of American correctional history can deny that litigation has provided the impetus for reform of medical practice in prisons in jails. . . ." Nathan, supra n.16, at 3. A noted scholar of correctional matters observed: "During the 1970's medical care for American prisoners vastly improved. In no small part this trend may be attributed to the Supreme Court's decision in Estelle v. Gamble. . . ." Jacobs, New Perspectives on Prisons and Imprisonment at 29 (1983). Accord, Wishart & Dubler, supra n.6, at 5; Resnik & Shaw, "Prisoners of Their Sex: Health Problems of Incarcerated Women," in Robbins (ed.) II Prisoners' Rights Sourcebook 319, 320-21 (1980); Harris & Spiller, "After Decision: Implementation of Judicial Decrees in Correctional Settings" at 20-21 (American Bar Association, November 1976).

of inadequate and inhumane health care systems that have been elevated to constitutional acceptability through federal court litigation.[58] More generally, the prospect of litigation has encouraged corrections officials to improve medical services without waiting to be sued and has contributed to the development of professional standards governing prison health care.[59]

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58 Compare Battle v. Anderson, 376 F.Supp. 402, 415-16 (E.D.Okla. 1974), with Battle v. Anderson, 788 F.2d 1421, 1426-27 (10th Cir. 1986); Jones v. Wittenberg, 330 F.Supp. 707, 718 (N.D.Ohio 1971), aff'd sub nom. Jones v. Metzer, 456 F.2d 854 (6th Cir. 1972), with Jones v. Wittenberg, 509 F.Supp. 653, 684-87 (N.D.Ohio 1980); Lightfoot v. Walker, 486 F.Supp. 504 (S.D.Ill. 1980), with Lightfoot v. Walker, 619 F.Supp. 1481, 1489 (S.D.Ill. 1985), aff'd, 826 F.2d 516 (7th Cir. 1987); Finney v. Arkansas Board of Correction, 505 F.2d 194, 202-04 (8th Cir. 1974), subsequent order affirmed sub nom. Hutto v. Finney, 437 U.S. 678 (1978), with Finney v. Mabry, 546 F.Supp. 628, 631 (E.D.Ark. 1982).

59 Jacobs, supra n.57, at 29, 50-51, 57, 59; see also APHA Standards, supra n.6,

Although prison health care has substantially improved, the task is by no means complete. The same patterns of neglect and disorganization first exposed in the litigation of the early- and mid-1970's remain in many jails and prisons.[60] Some institutions -- particularly local jails -- remain untouched either by litigation or by the more general movement toward improved health care. Moreover, the struggle for adequate prison health care is never permanently won; growing inmate populations and competing demands

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(footnote cont'd)

n.6, vi-vii et passim (citing case law in support of standards).

60 See French v. Owens, 777 F.2d 1250, 1251, 1254-55 (7th Cir. 1985), cert. denied, ___U.S.___, 107 S.Ct. 77 (1986) (proof updated in 1984); Ruiz v. McCotter, 661 F.Supp. 112, 147 (S.D.Tex. 1986); Palmigiano v. Garrahy, 639 F.Supp. 244, 252-54 (D.R.I. 1986); Dean v. Coughlin, 623 F.Supp. at 395 (proof from 1984-85).

on governmental resources jeopardize the gains of the last decade.[61]

B. Existing Law Has Protected Prisoners' Rights to Minimally Decent Health Care Without Invading the Professional Discretion of Medical Practitioners.

In Estelle v. Gamble, 429 U.S. at 104, the Court held that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment's prohibition of cruel and unusual punishment. The Court distinguished such conduct from merely inadvertent or negligent diagnosis or treatment by a physician: "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Id. at 106.[62]

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61 See, e.g., Duran v. Anaya, 642 F.Supp. 510 (D.N.M. 1986) (preliminary injunction granted against cuts in medical and mental health care staffing that would threaten compliance with previously entered consent decree).

62 The court below did not determine

The Court found that the Estelle plaintiff's complaint was "a classic example of a matter for medical judgment" and as such was not cruel and unusual punishment.[63]

By applying this distinction, in both individual cases and injunctive class

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(footnote cont'd)

whether the allegations of petitioner's complaint state a claim under Estelle.

63 Id. at 107. The Court later adopted a similar approach to the due process right of mental patients to be free from excessive physical restraint, holding that decisions should be made by mental health professionals but that the courts should "make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." Youngberg v. Romeo, 457 U.S. 307, 321 (1982), quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (en banc) (Seitz, C.J., concurring). Cf. Vitek v. Jones, 445 U.S. 480, 495 (1980) (that the transfer of a prisoner to a mental institution involves medical judgment does not preclude due process protections).

actions, the federal courts have avoided invading or second-guessing the legitimate exercise of professional judgment. Mere disagreements with prison doctors or criticisms of their judgment do not state constitutional claims.[64] Rather, the federal prison health care cases focus primarily on outright denials of care, the absence of medical judgment,[65] factors

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[64] See, e.g., Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985); Randall v. Wyrick, 642 F.2d 304, 308 (8th Cir. 1981) and cases cited; Ferranti v. Moran, 618 F.2d 888, 891 (1st Cir. 1980); McCracken v. Jones, 562 F.2d 22, 24 (10th Cir. 1977), cert. denied, 435 U.S. 917 (1978); Limbert v. Umar, 585 F.Supp. 1413 (E.D.Pa. 1984); Burns v. Head Jailor, 576 F.Supp. 618, 620 (N.D.Ill. 1984).

[65] See, e.g., H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1086-87 (11th Cir. 1986) (inmate placed in isolation and kept from having his injuries evaluated); Hurst v. Phelps, 579 F.2d 940 (5th Cir. 1978) (refusal to take prisoner to doctor's appointments); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979) (lack of access to psychiatric diagnosis and treatment); see also cases cited in Estelle v. Gamble, 429 U.S. at 105, n.11.

interfering with the exercise of such judgment,[66] or failures to carry out medical decisions once made.[67]

The actual decisions of prison medical personnel are at issue under Estelle only when "[deliberate] indifference is manifested by prison doctors in their response to the prisoner's needs. . . .," 429 U.S. at 104 (footnote omitted) -- that

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[66] See, e.g., Matzker v. Herr, 748 F.2d 1142, 1147-48 (7th Cir. 1984) (three-month failure to treat eye and dental injuries because jail "lacked the facilities"); Todaro v. Ward, 431 F.Supp. at 1144-45 (sick call procedure conducted under conditions that precluded an adequate examination by nursing professionals).

[67] See, e.g., Gill v. Mooney, 824 F.2d 192, 195-96 (2d Cir. 1987) (inmate forced to carry heavy load and denied rehabilitative exercise, both contrary to medical orders); Cummings v. Dunn, 630 F.2d 649 (8th Cir. 1980) (denial of medication); see also cases cited in Estelle v. Gamble, 429 U.S. at 105 n.12.

is, when they are not actually medical in nature,[68] or are so extreme or abusive as to be completely outside the range of professional medical judgment.[69]

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[68] A prisoner's allegation that he was denied surgery for a painful condition by a doctor for budgetary rather than medical reasons raised an Eighth Amendment claim. Jones v. Johnson, 781 F.2d 769 (9th Cir. 1986); accord, Jorden v. Farrier, 738 F.2d 1347 (8th Cir. 1986) (denial of previously prescribed medication by prison doctor would be actionable if administrative rather than medical in nature); see Neisser, supra n.7, at 959-60.

[69] Thus, in Williams v. Vincent, 508 F.2d 541, 544-45 (2d Cir. 1974), cited with approval in Estelle, 429 U.S. at 104 n. 10, an Eighth Amendment claim was stated by the allegation that a prison doctor threw away the plaintiff's severed ear rather than trying to reattach it, simply because it was easier. See other cases cited in Estelle, id.; see also Rogers v. Evans, 792 F.2d 1052, 1059-62 (11th Cir. 1986) (evidence that psychiatrist avoided prisoner after complaints were made about treatment and that diagnosis and treatment were completely outside the range of professional judgment created a triable Eighth Amendment issue); Wells v. Franzen, 777 F.2d 1258, 1264-65 (7th Cir. 1985) (deprivation of shackled inmate of exercise, clothing and showers, and requirement that he eat with his fingers next to his two-day-old urine); Knecht v. Gillman,

Similarly, in injunctive challenges to prison medical systems, the federal courts have not only protected the sphere of judgment surrounding medical practitioners' treatment and diagnostic decisions but have often enhanced it. At issue in a typical injunctive case are such matters as staffing, physical facilities, transportation, and sick call and follow-up procedures. See, e.g., Wellman v. Faulkner, 715 F.2d 269, 272-74 (7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984); Ramos v. Lamm, 639 F.2d 559, 575-76 (10th Cir.), cert. denied, 450 U.S. 1041 (1980); Inmates of Allegheny County Jail v. Pierce, 612 F.2d at 761-63. When

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(footnote cont'd)

488 F.2d 1136 (8th Cir. 1973) (use of drug that induced vomiting as "aversive therapy" for rules violations). Cf. Youngberg v. Romeo, 457 U.S. at 321 (discussion at n.63, supra).

a court orders relief in these areas, it is assuring that the raw materials from which responsible professional judgment is formed are available to practitioners.

C. The Courts Must Be Able to Enjoin Health Care Staff Directly in Order to Fashion Effective Relief for Violations of the Constitutional Standard.

In injunctive § 1983 cases, it may sometimes be sufficient to enjoin prison wardens or other officials who interfere with medical decisions or who fail to provide adequate medical staff or other resources. In other situations, part or all of the constitutional violation lies in the acts or omissions of the medical staff themselves. Where health care practitioners, through disorganization, bad intent, or lack of interest are themselves not exercising professional judgment, it is clearly a practical necessity that they be parties defendant and be subject to the

terms of injunctions.

For example, in one systemic case, the court found constitutional violations in inadequate sick call procedures, lack of access to medical practitioners by infirmary patients, and failure to follow up abnormal test results. The court ordered that practitioners keep records of their encounters with sick call patients,[70] that nurses and doctors conduct infirmary rounds, and that the physicians who order tests review the results for abnormalities. Todaro v.

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[70] The court found a constitutional violation in nurses' failure to make adequate records of medical complaints, Todaro v. Ward, 431 F.Supp. at 1145-6, and several other courts have ruled similarly. Hoptowit v. Ray, 682 F.2d 1237, 1252-54 (9th Cir. 1982); Burks v. Teasdale, 492 F.Supp. 650, 660-65 (W.D.Mo. 1980); Lightfoot v. Walker, 486 F.Supp. at 517, 527. Adequate medical records are an indispensable element of correctional health care. Neisser, supra n.7, at 970; APHA Standards, supra n.1, Part 11, at 99.

Ward, 431 F.Supp. at 1151-53, 1160.[71] In another case, involving unconstitutional delays in access to dental care and a failure to provide treatment that was ordered, Dean v. Coughlin, 623 F.Supp. 392 (S.D.N.Y. 1985),[72] the court imposed general deadlines for the delivery of services, subject in each case to the individualized professional judgment of the treating dentist.[73]

In entering such orders, courts may properly require that professional discre-

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[71] Excerpts from the injunction in Todaro are set forth in Wishart & Dubler, supra n.6, at 169-73.

[72] The court found, inter alia, that the staff dentist and dental hygienist had ignored over three hundred written requests for dental appointments because they considered them "worthless." Id. at 395.

[73] 633 F. Supp. 308, 310-15 (S.D.N.Y), injunction vacated on other grounds but pertinent portion approved, 804 F.2d 207, 215-6 n.2 (2d Cir. 1986).

tion be exercised, on an informed basis,[74] without dictating the outcome of medical judgment. For example, courts have required the treating physician to specify the time for a test or examination or within which a specialist consultation or hospital admission must occur. In turn, once the doctor has determined the appropriate time limits, the court will direct that the order be honored by other medical and correctional staff.[75] In such cases, it serves, rather than detracts from, the independence of medical professionals when the courts

> ... ensure that decisions concerning the nature and timing of medical care are made by medical personnel, using equipment

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[74] See Neisser, supra n.7, at 956-69.

[75] Neisser, supra n.7, at 971-2; Winner, supra n.37, at 77-79. See also Todaro v. Ward, 431 F. Supp. at 1152; Miller v. Carson, 401 F. Supp. 835, 878 (M.D. Fla. 1975).

> designed for medical use, in locations conducive to medical functions, and for reasons that are purely medical.[76]

D. Orders Requiring Custodial and Supervisory Personnel to Guarantee the Performance of Health Care Providers Would Decrease Their Professional Independence.

A touchstone of APHA's approach to prison health care is the professional independence of the medical unit within the correction setting. Medical staff should be hired, supervised, and dismissed by medical superiors and accountable to them rather than correctional officials. Maintaining separate medical and correctional lines of authority helps to safeguard professional autonomy.

Yet, the necessary result of affirmance of the decision below would be the issuance of regulatory injunctions

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76 Neisser, supra n.7, at 956-7.

regarding the professional performance of health care staff against lay wardens and department heads, who will be the only defendants left. Such a result is both theoretically unsound and practically unworkable. Non-health-care supervisors cannot be expected to determine if accurate medical records are being kept, whether meaningful examinations or rounds are conducted, or if test results are abnormal. They will be unable to tell whether compliance with orders concerning such matters is genuine or a sham.

Worse, such an outcome will reimpose the "disorganized lines of therapeutic responsibility"[77] that guarantee correctional interference with medical care delivery and which advocates of prison

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77 See Newman v. Alabama, 503 F.2d 1320, 1331 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975).

health care have attempted for years to overcome.[78] This Court ought not eliminate from § 1983 cases those defendants who, by training and responsibility, are in the best position to effectuate injunctive relief designed to upgrade health care delivery to constitutional minima.

III. HEALTH CARE PRACTITIONERS SHOULD BE CONSIDERED TO BE ACTING "UNDER COLOR OF STATE LAW" WHEN THEY TREAT INMATES MORE THAN OCCASIONALLY IN A SETTING THAT IS DEMONSTRABLY CORRECTIONAL OR UNDER CIRCUMSTANCES THAT SUBSTANTIALLY DISTINGUISH THE PRISONER-PATIENT FROM OTHER PATIENTS SERVED.

In this case, the definition of "color of law" must acknowledge the realities of correctional medical practice. As shown supra, the Fourth Circuit

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78 "If medical care decisions constitutionally may be made only by medical personnel, correctional supervision of such personnel necessarily seems unacceptable." Neisser, supra n.7, at 961.

erred in assuming that prison health staff, like the public defenders in Polk County v. Dodson, enjoy such "independence from administrative direction," 815 F.2d at 995, that their decisions are uninfluenced by the institutional setting, and that they are wholly divorced from custodial and supervisory functions. A definition of color of law should not be based on these false premises.

Amicus proposes that prison medical staff should be deemed to act under color of state law when they treat inmates more than occasionally in a setting that is demonstrably correctional or under circumstances that substantially distinguish prisoners from other patients served. This test attributes the activities of prison health staff to the state when circumstances caution that their actions, clearly "clothed with the authority of

state law,"[79] are also most likely to be pervasively affected by it. The standard is a functional one, avoiding talismanic reliance on the place of treatment or the practitioner's employment status and focussing instead on his or her degree of involvement with the correctional system and with prisoner-patients as a group. The test recognizes, however, that not all health professionals who treat inmates are influenced to the same degree[80] and that a reasonable line must be drawn because of the variety of contexts in which correctional health care is delivered.

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79 Monroe v. Pape, 365 U.S. 167, 184 (1961), quoting United States v. Classic, 313 U.S. 325, 326 (1941).

80 Amicus does not suggest that practitioners who fit within the proposed standard regularly violate the Constitution but rather that there is sufficient state involvement in their conduct to subject them to "deliberate indifference" scrutiny under § 1983.

Under this test, the full-time public employees of a state or local government performing medical services within a prison or jail should be considered to act under color of state law when they treat patients. These doctors, nurses, physician's assistants and others are the paradigmatic group on whose work the prison milieu most strongly impinges. The standard will in some cases, but not all, also include as state actors consulting, part-time, and contractual employees.

A. Consulting, Part-time, and Contractual Health Professionals Are Subject to the Same Correctional Influences on Professional Judgment As Regular Institutional Staff.

Prisons and jails cannot offer all the personnel and facilities needed for inmates' medical care. As a result, there is almost universal reliance on outside consultants and services, usually on a

part-time[81] or contractual basis.[82] Correctional imperatives affect the behavior of these employees.

The medical consultation process in a prison is influenced by the same factors that affect prison and jail health delivery systems generally. Consultations involve issues of security, transportation, administration, and communication between the referring and the consulting physicians. Simply locating a consultant willing to see prisoners can be a major problem, and once one is found the epidemiological characteristics of prisons and jails and the difficulty or impossibility of providing sophisticated medication regimens, diets, prostheses, or diagnostic procedures on cell blocks or even in prison infirmaries all affect the exercise of medical judgment by the consultant,[83] as illustrated by the advice to prison medical consultants described supra at 16-17.

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81 Since small jails rely almost exclusively on fee-for-service health staff, Steinwald, et al., Medical Care in U.S. Jails 22 (American Medical Association 1973), excluding them from the definition of "color of law" would create a double standard based on institution size and arbitrarily deprive some inmates of a remedy available to those in larger systems.

82 A recent survey showed that only four states had no contractual prison medical services; another four had contracted out all their health services. In some cases, contractual services are rendered at outside hospitals or doctors' private offices; in other cases, including that of the North Carolina physician in this case, the contractual practitioner renders care in the prison itself. "Prison Health Care," 11 Corrections Compendium 7-14 (July 1986).

83 For example, it may be impossible to perform many procedures or arrive at certain diagnoses precisely because the patient is in a correctional institution. An example of this is twenty-four hour collection of urine for analysis -- easy in the patient's home, nearly impossible in the lockup. Lessenger & Bader, supra n.19, at 97.

Similar forces affect the behavior of part-time and contractual[84] employees. It is their function within the institution, not their employee status, that determines whether their professional independence is sufficiently assured to consider them independent of state action.

Such influences will be stronger as the frequency of contact with the institution increases. Thus, when practitioners treat inmate patients regularly or frequently (i.e., "more than occasionally"), they are more likely to be affected by

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84 The Fourth Circuit's decision in Calvert v. Sharp, 748 F.2d 861, 863 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985), upon which the en banc court relied in the instant case, found that a doctor's status as an employee of a company providing prison medical services under contract was determinative in defeating state action. For the reasons set forth in this brief, exclusive reliance on this factor is misplaced. See Ort v. Pinchback, 786 F.2d 1105, 1107 (11th Cir. 1986).

non-medical considerations than is a practitioner with casual or episodic contact. If these patient encounters occur within a prison or in special inmate facilities, such as secure wards (i.e., "under circumstances that are demonstrably correctional"),[85] one can expect the institutional influences on the behavior of health workers to be sufficiently pervasive to characterize them as acting under color of state law.

Similarly, if practitioners treat prisoner-patients "more than occasionally" under circumstances that are very different from their ordinary civilian physician-patient relationships (i.e., prisoner-patients are "substantially dis-

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85 Lessenger & Bader, supra n.19, at 99, suggest that hospitals who do not want shackled prisoners and uniformed guards in their departments arrange for the patient to be seen in a separate secure room.

tinguished" from other patients), care should be deemed to occur under color of state law. Examples include private dentists who regularly treat prisoners in their own offices but limit their services to extractions and specialists, paid by the visit, who provide cursory examinations of or treatment for inmates seen in groups.

Adoption of this test will assure that the activities of health professionals -- full-time, part-time, consulting or contractual -- are subject to federal court jurisdiction when there is danger that their performance will be inadequate, not due to any mistake, inadvertence, or negligence, but because the state-imposed correctional setting has changed the way they practice.

B. The Proposed Standard Is Easily Applied and Will Avoid Biasing the States' Decisions As to the Privatization of Prison Health Services.

The proposed standard, although fact-based, is not difficult in application, and the employees' status as state actors can be resolved in most cases on summary judgment without a hearing. The test is also consistent with the "necessarily fact-bound inquiry" prescribed in this Court's prior color of law cases. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982), quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)[86] The lower court's wide-ranging application

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[86] Accord, Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 164 (1978).

of Polk County v. Dodson, while perhaps offering the surface appeal of greater simplicity, ignores the warning that "differences in circumstances beget differences in law," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974), and that professional discretion exercised by a public defender under the scrutiny of a court is different from the actions of a prison doctor serving at the pleasure of the warden.

In adopting the proposed standard, the Court will avoid biasing governmental decisions as to the best means of supplying prison medical care. There is already some evidence that governmental units have embraced "privatization" of prison services in the hope of avoiding or minimizing legal liability or dispersing accountability.[87]

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[87] NKC Management, Evaluation of the State

The relative merits of contractual and in-house medical services for prisons and jails depend on numerous factors, including the type of service, the geographical area, and the kind of popula-

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(footnote cont'd)

of Maryland's Medical Services Program for Inmates (November 1986) at 19-20; Note, "Inmates' Rights and the Privatization of Prisons," 86 Col.L.Rev. 1475, 1499-1500 nn. 171-72 and materials cited (1986); Robbins, "Privatization of Corrections: Defining the Issues," in Robbins (ed.), Prisoners and the Law 22-3 - 22-5 (1987). Dispersion of accountability can lead to the belief that one's actions are beyond the law. An employee who reviewed disciplinary cases at a privately run Immigration and Naturalization Service facility in Houston recently boasted to a reporter: "I'm the Supreme Court." Robbins, id., citing N.Y. Times (Feb. 19, 1985) at A15. Cf. Evans v. Newton, 382 U.S. 296 (1966) (public park transferred to private management to avoid reach of civil rights laws); Classen, "Hospital Liability for Independent Contractors: Where Do We Go from Here?" 40 Ark. L. Rev. 469, 471 (1987) (courts view independent contractor clauses as "thinly veiled attempts by hospitals to shirk their responsibility to the patient") (footnote omitted).

tion to be served. The choice should be based solely on considerations of providing adequate services, and the Court should not adopt a legal rule that would distort it.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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